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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA

v.

12 CR 626 (ER)

4 RAYMOND CHRISTIAN a/k/a

"Reckless"

5 GLENN THOMAS, a/k/a "Gucci"

TYRELL WHITAKER, a/k/a "Bow Wow"

Defendants

6 -----x

New York, N.Y.

August 1, 2014

2:30 p.m.

9 Before:

HON. EDGARDO RAMOS

District Judge

11 APPEARANCES

12 PREET BHARARA

United States Attorney for the

13 Southern District of New York

ANDREW BAUER

14 KAN M. NAWADAY

Assistant United States Attorney

15 DAVID S. GREENFIELD

and

16 ANTHONY STRAZZA

17 Attorneys for Defendant Christian

18 LAW OFFICES OF DON BUCHWALD

Attorney for Defendant Thomas

19 DON D. BUCHWALD

20 KELLEY DRYE & WARREN LLP

Attorney for Defendant Thomas

21 LEVI DOWNING

22 GEORGE ROBERT GOLTZER

and

23 YING STAFFORD

Attorneys for Defendant Whitaker

24 -- also present--

S.A. Andrei Petron - FBI

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(In open court)

THE COURT: Good afternoon, everyone. Please be seated.

THE DEPUTY CLERK: In the matter of United States v. Christian, et al. Would the parties please advise state your name for the record.

MR. BAUER: Andrew Bauer and Kan Nawaday for the government. I will let you know that Special Agent Andrei Petron from the FBI will be joining momentarily.

THE COURT: Very well.

MR. GREENFIELD: David Greenfield and Adam Strazza representing Raymond Christian seated in the box closest to you.

MR. GOLTZER: Ling Stafford and George Goltzer on behalf Mr. Whitaker present in the jury box.

MR BUCHWALD: Don Buchwald and Levi Downing for Mr. Glenn Thomas who is present in the jury box.

THE COURT: Good afternoon to all of you. Everyone can be seated.

This matter is on for the final pretrial conference. I take it that the parties anticipate that there will not be a plea between now and Monday morning?

MR. GOLTZER: That's correct.

THE COURT: In that event, I have reviewed the parties' pretrial submissions and motions in limine. What I

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1 want to do first is go over the mechanics of how we will pick
2 the jury.

3 In that regard, I had my chambers email to all counsel
4 the venire form that I propose to use with the voir dire. We
5 will get to that in a moment.

6 There has been a request for additional peremptory
7 challenges by the defendants; specifically, Mr. Christian has
8 asked that each defendant be essentially granted six peremptory
9 challenges for a total of 18, which would be eight over what
10 the rules allow.

11 Mr. Bauer, do you have a view as to the peremptory
12 challenges, the number of them?

13 MR. BAUER: Your Honor, our office takes no position
14 on the specific requests. Our only request is that if your
15 Honor is inclined to grant these additional peremptories, that
16 the government be awarded the proportionate amount in return.

17 THE COURT: Mr. Greenfield, why 18?

18 MR. GREENFIELD: Your Honor, we just honestly picked a
19 number out of the hat. We were talking about it the other day.
20 The last time Mr. Goltzer and myself had a question like this
21 arise, the numbers that we used were 16 and 9 which I think
22 breaks out just about to 10 and 6. So that really would be our
23 request at this point. Mr. Buchwald and Mr. Goltzer join in
24 our request.

25 THE COURT: OK. Now, this does not appear to me to be

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1 a case where there are going to be terribly conflicting
2 defenses as amongst the defendants and without revealing any
3 defense strategy. Am I completely off base with regard to that
4 assumption?

5 MR. GOLTZER: Your Honor, this is a matter of tension
6 in terms of strategic judgment as opposed to a conflicting
7 defense entirely, so I think your Honor is three-quarters
8 right.

9 THE COURT: OK. What I would propose to do is I would
10 propose to give each defendant one additional peremptory for a
11 total of 13 and give the government one additional peremptory
12 for a total of seven and those additional three peremptories
13 can be used individually. Did you have a view as to whether or
14 not you would use the balance or the first ten individually or
15 as a group?

16 MR. GOLTZER: I think what we will try to do is use
17 them as a group. We will do our best to use them as a group.

18 THE COURT: Very well. Just in terms of the rounds, I
19 would propose to have a total of seven rounds where the
20 government would use its one peremptory per round. And the
21 defendants would have two peremptories in the first four
22 rounds. And then one peremptory in round one, one in round six
23 and the three individual peremptories in round seven. OK? So
24 for the defendants it will be two, two, two, two, one, one,
25 three. And for the government it will be one. All right? So

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1 that with a total of 20 peremptories -- let me ask this next
2 question: Do we need more than two jurors above the 12?

3 MR. GOLTZER: Yes.

4 THE COURT: How many?

5 MR. GREENFIELD: I would suggest four, Judge.

6 THE COURT: It's only expected to be a three-week
7 trial, correct?

8 MR. BAUER: Yes, your Honor.

9 THE COURT: Does the government have a view as to the
10 number of jurors?

11 MR. BAUER: I think more than two might be appropriate
12 but maybe not four. How about we say three so we have 15?

13 MR. GOLTZER: We take the view that what can go wrong,
14 generally does.

15 THE COURT: Especially in August.

16 MR. GOLTZER: Right.

17 THE COURT: OK.

18 MR. GOLTZER: It hardly seems a great burden to go to
19 four instead of three because that way we are very sure we have
20 them.

21 THE COURT: So we have 20 peremptories, and we want to
22 wind up at the end of the day with 16, that would be a total of
23 36 jurors that we would put in the box, so to speak, to strike
24 from.

25 MR. BUCHWALD: I think you need a few extras for the

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1 challenges for the alternates.

2 THE COURT: What I propose to do is just pick from the
3 pool, and when we are done with all of the challenges for cause
4 and all of the peremp2tories, the last 14 or the last 16 will
5 be the jury. The first 12 of those 16 will be the actual
6 jurors and the other four the alternates.

7 MR BUCHWALD: I hear you, your Honor. Generally, when
8 it's ten and six, we then each get two or we each get one for
9 the alternates, so, I'm not sure what your Honor intended with
10 respect to that. But generally there are additional
11 peremptories. When you start with the normal ten and six,
12 there are then additional challenges that each side has, either
13 one or two apiece for alternates.

14 MR. GOLTZER: For per seat.

15 MR BUCHWALD: Per side. So, if we're being given
16 additional challenges, then however many we're being given a
17 total, you'll want to add to the 36, if my math is right.

18 THE COURT: Well, again, is there an objection with
19 just proceeding with one pool and having the last four jurors
20 numerically that remain be the alternates?

21 MR BUCHWALD: No, your Honor, but then we are not
22 really getting three additional. Ordinarily, we would have
23 ten.

24 THE COURT: I see what you're saying.

25 MR BUCHWALD: We would need more for the alternates.

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1 THE COURT: You're saying you're entitled to more.

2 MR BUCHWALD: That's right.

3 THE COURT: Theoretically, no, because you're not
4 entitled to the three additional I gave you, but Mr. Nawaday?

5 MR. NAWADAY: I believe Mr. Buchwald is correct under
6 Criminal Procedure Rule 24. It's my understanding that if
7 there are one or two alternates, each side gets one additional
8 peremptory challenge. And if there are or four alternates,
9 each side gets two additional challenges.

10 THE COURT: Does that assume ten peremptories?

11 MR. NAWADAY: That does assume ten peremptories, but
12 the way I am reading the rule that the alternate juror
13 selection and peremptories relating to those jurors is separate
14 from the peremptory challenges you get for the regular jurors.

15 MR. GOLTZER: Our position is based upon your Honor's
16 prior ruling for which we are very grateful there would need to
17 be 40 in the struck panel because there would be two
18 peremptories for the government and two for the defense in
19 addition to the 16 that your Honor has already provided under
20 rule 24. So there's a total of 20 under Rule 24 that you've
21 exercised your discretion favorably there still remain two and
22 two for the government and the defense.

23 THE COURT: So 40.

24 MR. GOLTZER: Right.

25 THE COURT: How many does the government get? Eight

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1 peremptories, seven plus the one or six?

2 MR. BAUER: Seven plus the two is seven for the
3 regular juror pool and two additional for the alternates, total
4 of nine. And the defense would have 13 plus two.

5 MR BUCHWALD: 15 and 9.

6 THE COURT: 15 and 9, right. So a total of 40 in the
7 box. OK. And the last four will be the alternates. The way
8 that I propose to do it is once we get them situated, there
9 will be potential jurors 1 through 40. I go through with the
10 very first one each of the questions in the Part One of the
11 voir dire form. Then with each subsequent juror, I simply ask
12 them if they have any affirmative responses to that part of the
13 form and we go right to those questions.

14 As challenges for cause become evident and as jurors
15 are being challenged for cause and are stricken for cause, we
16 immediately replace that empty chair with another person from
17 the venire and that person is questioned concerning part one of
18 the form.

19 In that fashion, once we get through 1 through 40,
20 ostensibly clean jurors, if you will, at that point I will go
21 to the Part Two of the form. We have 40 people in the box. I
22 ask each juror each question in Part Two, and presumably that
23 process will not yield any for cause challenges. If they do,
24 we replace that person; but assuming that they don't, once we
25 go through Part Two of the form asking each potential juror

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1 each question, at that point we exercise the peremptories. OK?
2 Very well. Any questions on that?

3 MR. GOLTZER: No.

4 THE COURT: I do have a normal trial day, which is to
5 say, I start at 9:30, I break at 5:00. I have one break mid
6 morning; one break mid afternoon. I ask that the lawyers be
7 here by 9:00 a.m. each day in the event we need to address any
8 issues, and there are always issues that we need to address.
9 If I see that the jury is getting heavy-lidded at some point in
10 the afternoon, I may have an additional brief break in the
11 afternoon.

12 No speaking objections. So if you have an objection,
13 stand, say what the basis of the objection is, whether it's
14 hearsay or asked and answered. Don't argue.

15 Also, don't make any discovery requests in front of
16 the jury. So, if someone proffers a document, don't stand up
17 and say, "Your Honor, I've never seen this before, I demand it
18 be provided," nothing like that. If you have an objection and
19 you want to be heard at side bar, I'm happy to hear you at side
20 bar. So, that covers sort of the nuts and bolts.

21 MR. GOLTZER: Five days a week Judge?

22 THE COURT: Four days.

23 MR. GREENFIELD: Judge, can I address one thing? We
24 call it Buchwald day, 9:30 to 2:30 or 3:00. Would you consider
25 that with a very small break for lunch? Judge Buchwald, Don

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1 Buchwald's wife used that --

2 THE COURT: There are several of my colleagues that
3 use that day.

4 MR. GREENFIELD: It would be helpful for us in
5 preparation for the next day. That's why I suggest it. we
6 didn't have a chance to talk about it before, but I think it
7 would be helpful in a case like this.

8 THE COURT: Does the government have a view? I've
9 never done it. I would be disinclined; but if there is a
10 strong movement afoot...

11 MR. BAUER: Judge, first of all, I'm shocked to hear
12 that Don Buchwald is married to a Judge. I've never heard that
13 before.

14 Second of all, your Honor, I am concerned about the
15 duration of the trial. It's August, and I think it is going to
16 be tough to seat 40 jurors to begin with who don't have
17 vacation schedules. To the extent we're extending closer to
18 Labor Day, it is going to be even more of a problem. I
19 understand Mr. Greenfield's request, but I think your
20 inclination to do the full day given when this trial is
21 starting makes the most sense.

22 THE COURT: Mr. Buckwald.

23 MR BUCHWALD: As far as duration, the fact that the
24 day doesn't longer, there's no lunch break. There is a
25 morning -- 15 or 20 minute break at one point. There is no

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1 lunch break. And, in fact, the number of pages of transcript
2 are the same because you don't have a lunch break. You don't
3 have a second short -- usually there's a ten, 15 minute break
4 morning and afternoon and the lunch break. So there is one 20
5 minute break at some point, unless somebody has to go to the
6 bathroom. I think your Honor is probably familiar with the
7 pros and cons of it.

8 THE COURT: Right.

9 MR BUCHWALD: It often is better for the jurors
10 because you can get certain jurors who are delighted to hear
11 they can get to their office at 3:30 and accomplish something.
12 I find it is better for all of the lawyers because they could
13 prepare, and particularly the older lawyers.

14 MR. GREENFIELD: There are three of them.

15 MR BUCHWALD: Three CJA attorneys here who are all
16 over the hill. It is of tremendous advantage because you can
17 actually prepare and get some sleep, but -- I take it
18 Mr. Bauer's office is probably split on what they prefer and
19 what they don't, but it doesn't cause the trial to be longer.
20 In fact, everybody is better prepared.

21 THE COURT: As somebody with gray hair, I was going to
22 suggest we start at noon, but instead, I will defer to my
23 colleagues.

24 MR. BAUER: Your Honor, I've had positive and negative
25 experiences with abridged trial day. Two concerns -- I think

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1 Judge Karas calls it a more efficient trial day.

2 One concern is starting on time. It sounds all well
3 and good, but if we are not going to start exactly at 9:30 and
4 the start time doesn't begin until 10:00, it is certainly not
5 efficient.

6 The other thing is most judges who sit that schedule,
7 sit the full five days.

8 THE COURT: Right.

9 MR. BAUER: Which I am not sure what your availability
10 is.

11 THE COURT: Well, here are a couple of points: First
12 of all, I start on time. I start at 9:30. I expect the
13 lawyers to be here at 9:30. I will tell the jury from the very
14 beginning that I will make sure that we are the not wasting any
15 of their time. So, I absolutely will start at 9:30 every day.
16 I absolutely will end at 5:00 every day. If I say 15 minutes
17 per break, I'm on the bench 15 minutes later. If I say an hour
18 and 15 minutes for lunch, I'm on the bench an hour and 15
19 minutes later. So, I make sure that everyone is conditioned
20 from the very first day to make sure that we do not engage in
21 any sort of time creep.

22 What I have thought because of the month is, I had not
23 planned on sitting on Fridays. However, I will endeavor to sit
24 at least half day on Fridays; maybe not the first week, but the
25 subsequent weeks so that we use that time as much as we can.

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1 So, yes, let's just go with the regular day.

2 MR. GOLTZER: And not the 8th; we're not sitting on
3 Friday?

4 THE COURT: Correct. Correct. OK?

5 Now to the motions in limine.

6 MR BUCHWALD: Your Honor, with respect to the voir
7 dire questions --

8 THE COURT: Yes, sir.

9 MR BUCHWALD: -- I had filed what we called -- I'm
10 trying to remember the name of what we called it --
11 objections/proposed alternatives to the government's proposed
12 jury voir dire, which, for the most part, appears to have been
13 rejected, although I think perhaps one or two of the objections
14 have been granted because I don't see the government's
15 proposals.

16 THE COURT: You should assume -- and this would be an
17 accurate assumption on your part -- that we have received all
18 of your proposals; we have received all of your objections; and
19 what is reflected in what I have given you is my determination
20 as to whether I will accept or reject the recommendations.

21 MR BUCHWALD: That's fine, your Honor.

22 MR. GOLTZER: In case the record wasn't clear, may it
23 just reflect that we both, the other lawyers join in
24 Mr. Buckwald's applications to the extent that they have been
25 ruled upon by the Court.

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1 THE COURT: OK.

2 MR BUCHWALD: May we for purposes of the in limine
3 motions -- I know we didn't always follow up with letters
4 saying we join, but may a motion by one be deemed to be a
5 motion by all if it is applicable to the other defendants.

6 THE COURT: It would appear that all of the motions
7 are applicable across the board, so...

8 MR BUCHWALD: Thank you.

9 MR. BAUER: The government WITH voir dire I had two, I
10 think, relatively non-controversial additions. One is when you
11 list the law enforcement agencies involved paragraph 14 --

12 THE COURT: Yes.

13 MR. BAUER: -- I think the New York State Police
14 Department should be listed as well. They played a fairly
15 large role in our investigation, and it's the New York State
16 lab that's tested all of the drugs. So, unless you have an
17 objection, I would add them to that.

18 THE COURT: No. Absolutely. It is not, by the way,
19 to give anyone any proper respect. It is simply to advise the
20 venire that there may be numerous state police officer
21 personnel that testify.

22 MR. BAUER: In fact, your Honor, our proposed voir
23 dire did not have the New York State Police in there as well.
24 So, it's a thought in hindsight.

25 The other is just Part Two, when you ask about

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1 publications, what I've seen many of your colleagues do is just
2 publications either in print or online considering the reality
3 of how people read their news these days.

4 THE COURT: OK. That's question 53.

5 MR. BAUER: Correct.

6 THE COURT: I should advise the parties that I just
7 finished a civil case this morning and charged the jury just
8 before lunch. So, what has been handed to me is a note from
9 that jury; and depending on how long this goes, we may need to
10 take a short break so that I can deal with this.

11 So, anything else on the voir dire form?

12 MR BUCHWALD: With respect to the names of the
13 lawyers, if you could add on behalf of Mr. Thomas, Levi
14 Downing, who will also assist in the representation of
15 Mr. Thomas.

16 THE COURT: What's the name?

17 MR BUCHWALD: Levi, L-E-V-I. Downing, D-O-W-N-I-N-G.

18 THE COURT: Will Mr. Dratel be with us or not?

19 MR BUCHWALD: He will be, yes. He was unable to be
20 here this afternoon.

21 THE COURT: There is also a placeholder at question 19
22 for places, addresses, etc.

23 MR. BAUER: Yes. The government, your Honor, has put
24 together a draft of that document. I handed it to defense
25 counsel before today's proceeding. I've asked them to weigh

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1 in, and what I would propose to the Court is that as we send it
2 to your chambers, I guess it will be hard to do it by the end
3 of the week or end of today, but perhaps over the weekend so
4 you will have it first thing Monday morning.

5 THE COURT: How voluminous is this list?

6 MR. BAUER: Three pages.

7 THE COURT: Three pages of?

8 MR. BAUER: Names and places, really, the places are
9 just streets in Newburgh and the names of law enforcement
10 officers and persons of interest in Newburgh.

11 THE COURT: Very well. The sooner you can get that to
12 us, the better. Obviously, we will be working through the
13 weekend to be ready for Monday morning. So I would ask defense
14 lawyers to please take a look at what the government has
15 provided and get your comments back to them, so they can get
16 their comments back to us. And no later than midday Sunday,
17 OK?

18 MR. BAUER: Yes, your Honor.

19 THE COURT: Anything else on the voir dire form? OK.

20 Let's get to the infamous Kevin Burden tape. Now, as
21 I understand it, the government believes that this document is
22 admissible pursuant to Rule 804(b)(3) of the Federal Rules of
23 Evidence. The defendants object, and they assert that none of
24 the grounds or none of the elements of 804(b)(3) apply in this
25 case. Which one of you gentlemen wanted to take the lead?

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1 MR BUCHWALD: One comment. Your Honor, if I might, I
2 think Mr. Goltzer will take the lead on the 804(b)(3), but if I
3 might make it clear that our objection is also on confrontation
4 clause grounds. Specifically, in a situation where, number
5 one, the government controls the availability of the witness
6 here, Mr. Burden, Mr. Burden is somebody who has already pled
7 guilty. He can be immunized without prejudice to a potential
8 prosecution of Mr. Burden. He may still have a continuing
9 Fifth Amendment right until he appeals. That may well be the
10 law, but the government can overcome that.

11 THE COURT: How?

12 MR BUCHWALD: By immunizing him.

13 THE COURT: But they don't have to.

14 MR BUCHWALD: No, they don't, but it is within their
15 power to do it. In other words, they're the ones, unlike
16 certain situations, where they control his availability.

17 So what we have here is the government creating the
18 situation initially of putting their government agent, Mallory
19 at this point in time of the tape is a government agent for
20 purposes of analysis. They put the government agent in the
21 position of questioning or eliciting information from Burden.
22 They create the situation. They're creating the situation for
23 the purpose of prosecution; not for any other purpose.

24 It's not a situation where there is public emergency
25 or something like that, that they have to take care of.

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1 They're putting in the government agent to elicit information
2 for the purposes of prosecution. If this kind of thing is
3 allowed, we're always going to have situations where the
4 government doesn't try to interrogate a target of
5 investigation. The government will use the undercover calls to
6 some other person and will try to elicit from that other person
7 negative information about their true target. And that's what
8 we're going to have. It creates, it seems to me, a paradigm of
9 a confrontation clause issue.

10 I realize this isn't going within the parameters of is
11 this testimony or not testimony. It's the language that's
12 arisen up to now for purpose of confrontation clause analysis,
13 but that's what we're going to create here. We know what
14 prosecutors will do if this is permitted under the
15 confrontation clause. We are going to have a series of
16 situation, right, where you go to the weakest link, the person
17 who is the dumbest, you ply them with alcohol and marijuana --
18 I think that is going to go to one of Mr. Goltzer's argument as
19 to why this isn't reliable. You do whatever you can, not for
20 purposes of getting anything incriminating on them, but so that
21 they'll say something bad about the guy who they want to use it
22 against. Then you'll put in that tape -- not
23 cross-examinable -- you'll put that in in order to convict
24 somebody who will not have the opportunity cross-examine
25 because you in your discretion choose not to exercise the

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1 ability to force that person to testify.

2 So we want above and beyond the 804(b)(3) arguments --
3 and we'll hear the analysis in a minute -- we believe there is
4 a separate confrontation clause violation that is created by
5 the admission of this tape.

6 MR. GOLTZER: May it please the Court, should I
7 proceed?

8 THE COURT: Did you want to take care of the
9 confrontation clause issue first, Mr. Bauer?

10 MR. BAUER: It's taken care of pretty easily, your
11 Honor. There is no confrontation clause issue. The Supreme
12 Court has ruled upon it. I think Mr. Buchwald is arguing
13 apples and oranges.

14 Mr. Buckwald seems to be arguing a policy concern that
15 if this is allowed, it will open a Pandora's box. It has been
16 allowed for many years. This has been a practice that law
17 enforcement and prosecutors have relied upon for years. So, I
18 am not entirely sure what he thinks is going to happen if you,
19 Judge Ramos, allow this tape in and how that is going to change
20 the landscape of law enforcement.

21 804(b)(3): There is a reason for the rule, and the
22 reason to exclude hearsay generally is because there is no
23 guarantee of trustworthiness in this case; but 804(b)(3)
24 contemplates such a scenario where something is trustworthy and
25 the witness is unavailable, and so there is no confrontation

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1 clause issue, and it falls entirely into the question of
2 whether hearsay should be allowed. And there's a specific rule
3 which applies here, and the government argues that it is
4 entirely applicable, and that the statement is trustworthy.
5 Mr. Goltzer is about to tell you why he thinks it's not. But I
6 see no confrontation clause issue here, your Honor, and I'm not
7 sure Mr. Buckwald could point us to any legal authority to
8 suggest there is

9 THE COURT: I agree. I don't think that there is any
10 confrontation clause issue here. The type of circumstance
11 under which Mr. Burden has been taped has been acknowledged b
12 certain courts and the Second Circuit to be non-testimonial of
13 an individual who is not in custody who is making a statement
14 to someone who he believes to be a friend, shall we say, does
15 not raise confrontation clause concerns.

16 Moreover, Mr. Buckwald, I have to say, I don't quite
17 understand the concern that you raise. The situation that you
18 describe where the government goes after the least culpable
19 person of a conspiracy and attempts to get information from
20 them, that's just garden-variety investigation and prosecution.
21 Moreover, it is available through 804(b)(3) because that person
22 in addition makes inculpatory statements. So you don't have, I
23 think, the fear; there isn't the danger that someone who does
24 not face jeopardy is going to be free to give a lot of
25 inculcating statements about other people. So

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1 MR BUCHWALD: I wasn't meaning least culpable. What I
2 was meaning was least intelligent.

3 THE COURT: Well, with the least intelligent and less
4 culpable, the most vulnerable low-hanging food, if you will,
5 that's what law enforcement has done time immemorial.

6 MR BUCHWALD: We're dealing here with a situation
7 where it's a given that this is not co-conspirator statements
8 by the person who is being taped, which is where I believe all
9 of those cases -- that's the rubric that is coming in on all of
10 those cases, not on declaration against penal interest that
11 Mr. Bauer refers to and the plethora of cases that your Honor
12 has referred to because there is traditional statements in
13 furtherance of a conspiracy. In any event, I've been heard.

14 THE COURT: Very well. 804(b)(3), Mr. Goltzer. You
15 can remain sitting as long as you speak directly into the
16 microphone so we can all hear you. We have to be disciplined
17 about that in keeping our voices up in this room.

18 MR. GOLTZER: I actually think better when my feet are
19 moving.

20 THE COURT: Very well.

21 MR. GOLTZER: Let me just add a punctuation point to
22 Mr. Buckwald's argument. Just for the record, I expect that
23 the ruling would be the same.

24 To the extent that Mr. Buckwald has mentioned a
25 manipulation of the process of immunity, the defense might

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1 raise a due process argument under the Fifth Amendment as well
2 because what Mr. Buckwald quite sagely mentions was that the
3 government could, if it wished, give somebody derivative use
4 immunity so he could be called as a witness and the defense
5 would have a right to confront and cross-examine.

6 While the statements are not viewed as traditionally
7 testimonial, there is an irony here. The most reliable
8 statement that Mr. Burden ever made didn't implicate anybody
9 else; it simply implicated himself. It was in front of a court
10 when he pled guilty under oath, and he said, "I gave someone a
11 gun for use in a different crime." That statement would not be
12 admissible against any of these particular defendants because
13 that is very much testimonial.

14 Now, the government is going to tell you that it was a
15 reliable statement and it corroborates the tape, but it really
16 doesn't corroborate those portions of the tape that implicate
17 anybody else.

18 So, the real nub here, once we get past issues of
19 unavailability that were raised by Mr. Greenfield and
20 Mr. Buckwald in their respective submissions, once we get past
21 that, we come to that portion of the analysis which speaks to
22 circumstantial guarantees of trustworthiness that permit one to
23 introduce against these other defendants particular portions of
24 the tape-recording.

25 There is some new information that we had received

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1 which will bear on this -- and I think the government will
2 agree with it. The government mentioned in its memorandum that
3 a prospective witness by the name of Spongebob, who is going to
4 be testifying at the trial, which would obviate our concerns in
5 terms of confrontation, I am now told that Spongebob is not
6 going to be testifying; that the witness who we thought was
7 Spongebob, a gentleman by the name of Mr. McDermott who will be
8 testifying, is, in fact, not Spongebob; but Spongebob is
9 somebody named Pop.

10 In Mr. Strazza's submission -- in fact, may I ask the
11 government if that is correct?

12 THE COURT: Sure.

13 MR. BAUER: Sure. Your Honor, again allow me to
14 actually clarify this.

15 As Mr. Goltzer proceeds forward, I did confuse
16 Spongebob with Mr. McDermott in my submission. Mr. McDermott
17 will be testifying that he was at the house 261st Street when
18 Mr. Whitaker came to the house. It was Mr. McDermott who
19 opened the door and saw him in bloody clothes. He then tells
20 Mr. McDermott to get a garbage bag, and he went and -- and then
21 Mr. Whitaker -- actually, I think I reversed that.
22 Mr. McDermott helped Mr. Whitaker get a garbage bag and then
23 Mr. Whitaker went downstairs. Downstairs is where Spongebob
24 lived. He also goes by the name of Poppy. Most people know
25 him as Poppy. Kevin Burden and Jamar Mallory called him

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1 Spongebob because he had funny teeth, like Spongebob the
2 cartoon character.

3 He lived downstairs. So it's entirely consistent that
4 McDermott would have seen the bloody clothes, and then he went
5 downstairs. And Spongebob was down there waiting. And I
6 believe what Burden says is Spongebob kind of snuck up on
7 Mr. Whitaker and didn't say much. So, they're not opposing in
8 any way, but I -- to accept Mr. Goltzer's invitation, let me
9 clarify that Spongebob will be testifying, Mr. Whitaker will be
10 testifying -- Mr. McDermott will be testifying, but
11 Mr. McDermott will be testifying to very similar information to
12 what Spongebob would have testified to if we had been able to
13 locate him.

14 MR. GOLTZER: I want to thank the government for
15 making that known to us. After we received were served the
16 3500 material, nothing that I said should have been taken as
17 criticizing the government. If mr. Bauer says he was confused,
18 I accept that.

19 Mr. Strazza cited a case called *United States v. Lang*
20 in his memorandum. And Lang stands for the proposition that
21 even if something is to be admitted under 804(b)(3), it has to
22 be something that falls within the personal knowledge of the
23 declarant.

24 Obviously, with respect to this one particular issue
25 Burden and Mallory are repeating what somebody told them, and

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1 that certainly would -- reliability aside, it doesn't fit
2 within the rule of *United States v. Lang*, and that particular
3 portion involving the allegation of Mr. Whitaker somehow had
4 blood on his clothing shouldn't come in for that particular
5 personal knowledge reason.

6 There are other reasons as well, even if Spongebob is
7 going to testify that it shouldn't come in. There is a very
8 substantial reliability problem here. This is not an automatic
9 rule where somebody makes an admission, "I had a gun. I gave a
10 gun to somebody" and then he tells a story about other people.
11 The presumption, if you will, under the case that we've all
12 cited, *Williamson* is that accomplice statements are unreliable
13 because what people often do is they mix truth with falsehood.
14 That's the rule, generally when people make post arrest
15 statements, it's a common practice. It's

16 paramount from the tape itself that that's what's
17 going on here. You've got Burden and Mallory both going to
18 very great lengths to distance themselves from the unfortunate
19 incidents at 54 Chambers when Mr. Henry was killed. "They
20 questioned me. I really didn't know anything about it. We
21 weren't on point. We had nothing to do with that. We didn't
22 know what anybody was going to do. We were sitting home doing
23 something else. We had the kids. We don't know anything about
24 that. I wouldn't have given my gun away to do something like
25 that."

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1 But what the government wants to do is bring in a
2 statement by Mr. Burden and by Mr. Mallory to somehow
3 corroborate unreliable testimony. The government quite
4 correctly cited cases that said that you have to look at all
5 the facts surrounding the circumstances. You look at
6 reliability of the facts, you look at the reliability of the
7 declarant. You look at the reliability of the statement, in
8 connection with all the other evidence in the case.

9 Let's talk about Mr. Baynes. Baynes, which the
10 government says is CW-1, and he is going to testify in a way
11 consistent with the tape about Mr. Whitaker, Mr. Thomas and
12 about Mr. Christian. Baynes is somebody who was a chronic,
13 habitual liar by virtue of their evidence.

14 Baynes was questioned at a hospital on December 15 for
15 hours. He was questioned several times. And when they call
16 Baynes to the stand, Baynes is going to tell the jury he lied
17 through his teeth. And we're going to count up the number of
18 lies Baynes claimed he told; scores upon scores of lies.

19 He is going to say, "I didn't know who the other
20 people were. There were people I didn't recognize. I was
21 standing outside. I never went to the apartment. I didn't
22 know what happened. I got shot by a group of strangers.

23 "Wait a minute. Now, I'll tell you the truth. I did
24 go into the apartment, but I was only supposed to be a lookout.

25 "Wait a minute. I'll tell you the truth. X, Y and Z

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1 were shooting. I didn't have a gun.

2 "Wait a minute, that's not good enough. I'll change
3 my story again."

4 He changes his story again and again and again and
5 again, all within the matter of 24 hours. Finally, he admits
6 that he went in because he was worried about his friend's
7 brother, and he was stabbed inside the apartment. He never
8 mentions during that period of time Mr. Thomas or Mr. Whitaker.

9 It is not until May 11 of 2011, just about six months
10 later, that he first mentions people known as Bow Wow and
11 Thomas after originally having told the police that he couldn't
12 recognize anybody but certain other people.

13 THE COURT: Baynes, is it you're talking about?

14 MR. GOLTZER: Yes.

15 THE COURT: Is he the guy on the tape with Burden.

16 MR. GOLTZER: No, that's Burden. Burden is not going
17 to be a witness. But I'm talking about the corroborating
18 circumstances.

19 THE COURT: Right.

20 MR. GOLTZER: So the government has argued in its
21 memorandum in support of the notion that there are
22 corroborating circumstances, "We have informants who are going
23 to testify that Bow Wow is involved. We have informants who
24 are going to testify that Thomas was involved." But those
25 people carry tremendous amounts of baggage into this case,

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1 Judge, and there are no corroborating circumstances
2 demonstrating their reliability. It was only after six months
3 when the police were already targeting those people that he
4 changed his story and cut a deal with Orange County.

5 Now, it's even better. Mallory is their other major
6 informant who is on the tape. Mallory is plying Burden with
7 alcohol. They then smoke grass together. They're getting
8 drunk together. They disagree on what happened. They disagree
9 on who gave who a gun. That's on the tape itself.

10 Burden says in response to Mallory, "Uh-uh, I didn't
11 give him a gun; you did."

12 That's the last thing that Mallory wanted to hear.

13 Now in the latest submission from the government, he
14 suddenly remembers something different from what he told them
15 in the earlier proffers. Now he didn't give the gun to
16 Whitaker; he gave the gun to Thomas. It's totally filled with
17 ambiguity, with contradiction, with vagueness, with competing
18 recollections; hardly something that one would classify as
19 circumstantial guarantees of trustworthiness.

20 So, if you are going to allow anything in that is
21 truly against anyone's penal interest, it's the notion that "I
22 had a gun and I gave it to somebody," but you can't permit them
23 to implicate our clients when you can't find that there is
24 reliability here.

25 The notion that there was blood, for example, on

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1 Whitaker's clothing, when you look at Baynes' 3500 material and
2 all the other 3500 material in the case, there is no way
3 possible that there was blood on Whitaker's clothing.
4 Whitaker, according to every piece of evidence in the case,
5 never came into contact with anybody who was bleeding and was
6 not himself bleeding. So, they can testify today until
7 tomorrow when I get a chance to cross-examine him or
8 Ms. Stafford gets a chance to cross-examine him that he had
9 blood on his clothing, but they shouldn't hear it on a tape
10 which I can't cross-examine, which is double hearsay to begin
11 with. That's got to be out.

12 Implicating anybody as to who picked up the guns
13 shouldn't happen. There's 3500 that says, for example, that a
14 woman brought guns. There's 3500 material that says
15 Mr. Whitaker allegedly had a .38 caliber chrome revolver.
16 There is conflicting testimony that it was somebody else who
17 had the chrome revolver; that it was Mr. Whitaker who had a .9
18 millimeter. It's all over the place, Judge. And we won't be
19 given a fair trial, quite frankly.

20 In this case where it's going to be close evidentiary
21 questions and close factual questions -- and this is a triable
22 case, Judge -- and these men are risking a lot by going to
23 trial, but there are real issues here. Putting this tape in
24 will deny them a fair trial. It's pure hearsay, and it's not
25 subject to the exception. And, I don't know, I maybe the other

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1 lawyers may want to talk about the other pieces that they want
2 to put in, but it seems like pure character assassination when
3 they're talking about Bloods and other drug sales. That's just
4 pure character assassination.

5 But I'm primarily concerned and I think Mr. Buckwald
6 is primarily concerned about these guns. When you look at the
7 guns, it's all over the place as to who was firing and who
8 killed people.

9 THE COURT: Let's try to stay focused, Mr. Goltzer.

10 MR BUCHWALD: One other point. The government writes
11 in its 804(b)(3) analysis that the government is unaware of any
12 prior inconsistent statements by Burden. He's the person who's
13 statements are being he elicited by their agent Mallory. But
14 the 3500 material makes clear Burden is quoted by one of their
15 witnesses as saying it's Kev Gotti -- that's Burden nickname --
16 so 3507-27, the 3500 material from David Evans, who is one of
17 their cooperators who is testifying. "Kev Gotti told Fuzzy" --
18 that is the nickname of the witness that -- "J-Mark and L1
19 shot" -- referring to Joker -- "both of them."

20 The government's theory is not that either J-Mark --
21 J-Mark is Mallory himself -- and L1 is defendant Williams who
22 has been severed -- that they were the people who shot Joker.
23 That's entirely at odds with the government's theory now and
24 entirely inconsistent with what they are trying to elicit from
25 Burden on this tape.

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1 Burden nowhere -- I don't know if your Honor has had
2 an opportunity to listen or to watch the tape, it's on video,
3 and see the plying of liquor and the smoking of marijuana --
4 Burden is constantly resisting the words that Mallory tries to
5 put into his mouth. There is only one -- after Mallory five
6 times is referring to Gucci, you know Gucci coming, Gucci
7 coming, and Burden is resisting that. And finally the fifth
8 time, Burden utters the words Gucci, Bow Wow and Gucci. Your
9 Honor, I think that it simply doesn't meet the test of
10 reliability.

11 THE COURT: Let me go to Mr. Bauer, unless,
12 Mr. Greenfield, you wanted to add anything.

13 MR. GREENFIELD: Mr. Strazza.

14 THE COURT: Again, if I could ask you to focus right
15 now so that we have some structure to this argument. It
16 appears as though we are addressing the trustworthiness aspect
17 of the three-part requirement of Rule 804(b)(3).

18 Do you want to speak to that?

19 MR. STRAZZA: Well, the only thing I want to add that
20 hasn't been said already, Judge, was that the portion where it
21 was clear that Mr. Burden didn't recall what Mr. Mallory was
22 trying to pull from him, and at one point he even says, "I'll
23 refresh your recollection with this" and he goes into the whole
24 version. That was the only thing that wasn't mentioned by
25 co-counsel here that I just wanted to add.

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1 THE COURT: So, Mr. Bauer, there appear to be a number
2 of attacks on the trustworthiness of the statement. One is
3 obviously the circumstances, the use of alcohol and marijuana,
4 and I guess the government's view that corroboration will come
5 from these cooperating witnesses who counsel indicate are
6 inherently untrustworthy.

7 MR. BAUER: Yes, your Honor. A number of points.
8 First a all, a couple small things to get out of the way.
9 There was no smoking marijuana. They were drinking alcohol and
10 smoking cigarettes. That's number one.

11 Number two, I heard a lot of what Mr. Goltzer in
12 particular was saying as arguing -- arguing about the
13 unreliability of our witnesses. It was good to see a preview
14 of his jury address, but I -- you know, I am not sure that it
15 goes to the admissibility, but rather the weight, attacking the
16 credibility of our witnesses on other things that they are
17 going to be testifying about.

18 Judge, as to trustworthiness, the first point, and
19 most important point -- because is a lot of the cases that we
20 cite and a lot of the cases that defense counsel cite deal with
21 witnesses getting on the witness stand and summarizing what
22 somebody -- an out-of-court declarant who is unavailable said
23 to them.

24 We don't have that. We have a video. We have his
25 actual words, actual words of Kevin Burden to offer. So it is

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1 inherently reliable, and it is an important point to not forget
2 about is -- and I will address the was the Mr. Mallory trying
3 to ply answers out of Mr. Burden. The jury is going to see
4 exactly how it went down, and --

5 THE COURT: But are they really? Because what has
6 been proffered is six snippets of what I understand to be
7 several hours long conversation, correct?

8 MR. BAUER: Right. These are excerpts. I mean, your
9 Honor, we'd be here all day. They talk about totally
10 irrelevant and, frankly, inappropriate things on the call or on
11 the recording. So this is an effort to (A) streamline, but (B)
12 also to square our proffered evidence with 804(b)(3) because
13 the statements have to be against penal interest, so when
14 they're talking about women or what they did the night before,
15 those are not statements against penal interest. So we made an
16 effort to focus only on those.

17 I think the most common objection that defense counsel
18 have is that Mr. Burden and Mr. Mallory both professing their
19 ignorance of what was going to happen with the Joker at 54
20 Chambers Street, saying that that doesn't square with our
21 theory or, I'm sorry, they were saying they were not on point,
22 they were not on point and that doesn't square with our theory.

23 I'm not sure if they're being obtuse or just missing
24 the point. That is exactly what our proof is going to be. At
25 the time that L1 called up Mallory and said, "We need the guns

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1 -- I'm going to send some young boys over to get the chains" is
2 what he said, Mallory and Burden didn't know what it was for.
3 They were all part of the Bloods. They shared guns, and they
4 had a pretty good idea it was going to be either a robbery or a
5 shooting. But they were not on point. No one is going to
6 testify they were on point.

7 THE COURT: What does that mean, not on point?

8 MR. BAUER: On point means they didn't know what was
9 going to happen. They had an idea it was going to be a robbery
10 or a shooting. They didn't know anything about Joker. They
11 didn't know about 54 Chambers. They didn't know how many
12 people they were rolling with, a term Mr. Burden used.

13 It's entirely consistent with our theory, what
14 Mr. Mallory is going to say. So that was their most common --
15 the one I think each defense counsel had argued in their
16 various submission. I suggest to you that that is entirely
17 consistent with our theory and the other proof in the case.

18 The other thing that they've said is that Mr. Mallory
19 reluctantly or both were pulling admissions out of Mr. Burden.
20 And, for sure, there are times when Mr. Burden -- where
21 Mr. Mallory is saying things like "let me refresh your memory"
22 and suggesting what he remembered.

23 Mr. Burden was not a passive participant in this
24 conversation, your Honor. Just reading the transcript alone,
25 you can see that. And the fact that they pushed -- that he

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1 pushed back, Mr. Mallory said, "And then you gave him the
2 guns," Mr. Burden says, "No, no, no. I didn't give the guns.
3 I gave them to you and you gave them the guns." It's those
4 exact types of interchanges that show just how genuine the
5 conversation is. He's not passively saying, "Oh, yeah, I guess
6 that's right, I did." He's saying, "No, no, no. You got that
7 wrong, Mr. Mallory and I'll explain why."

8 He also -- on at least one instance where Mr. Mallory
9 is saying, "Do you remember this?" And Mr. Mallory goes ahead
10 and summarizes part of the story? Mr. Burden doesn't just say
11 "yeah;" he says, "Yes, I remember that exactly." That is not a
12 passive participant. He is adopting what Mr. Mallory just
13 said, when he says "I remember it exactly."

14 So it's, frankly, laughable to suggest he is plying
15 information out of him. It is how the conversation worked,
16 and, sure, Mr. Mallory had an initiative when he went there
17 that day; it was to talk about the Joker murder. That's why he
18 was bringing up the conversation. But Mr. Burden jumped right
19 in and talked about it with him.

20 Your Honor, as to the point about Tyrell Whitaker and
21 the blood on his clothes, Mr. Goltzer is incorrect, that there
22 is no -- that there will be no evidence that Mr. Whitaker came
23 into contact with anybody who was bleeding. As the proof will
24 come out, Mr. Whitaker was one of the shooters of Jeffrey
25 Henry. The shooting happened around a door, as you know, your

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1 Honor, so I don't think -- I don't the think the government's
2 theory is that Mr. Whitaker got blood on him from that
3 shooting, but after -- and your Honor is going to hear the 911
4 call that Mr. Henry makes. He gets shot once, he's screaming,
5 and then he gets shot a second time and the screaming stops.

6 At that point you hear voices behind him, two voices.
7 One of the voices the cooperators have identified as Mr. Thomas
8 and Mr. Whitaker. One of them says, "Let's get out of here"
9 and the other one says, "Check his pockets." And somebody
10 grabbed the phone and hangs up the phone. So somebody came in
11 very close contact with Jeffrey Henry who was bleeding from
12 many parts of his body. I don't know that it was Mr. Whitaker,
13 but to suggest it was impossible that he came in contact with
14 somebody who was bleeding, that is just not accurate.

15 Judge, Mr. Goltzer, in attacking the credibility of
16 our witnesses, was trying to suggest that there are a number of
17 factual inaccuracies in the excerpts we picked out. I see
18 none, and I think the evidence will bear that out. There are
19 no factual inaccuracies or inconsistencies with our evidence.

20 Mr. Goltzer was focusing on Anthony Baynes. Anthony
21 Baynes is not part of this conversation. Mr. Mallory is. And
22 Mr. Mallory is -- he will be testifying, and, for sure, he is
23 going to testify about how his story has changed over time.
24 That is not uncommon for cooperators, but that does not suggest
25 that this statement is unreliable. In fact, his testimony will

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1 square entirely with what Mr. Burden said on this video.

2 Judge, let's not forget what we are here for. We can
3 pick apart what happened during this video, and I welcome it
4 because I, frankly, think that there are no falsities here.
5 But let's not forget what we are here for.

6 When Mr. Burden made a statement, was it one that a
7 reasonable person in a declarant's position would not have made
8 unless believing it to be true? And he says, "I gave he gun to
9 you, Mr. Mallory and you gave it -- you gave it on. I knew
10 they were on something, but I didn't know what."

11 These are all statements that he would not have made
12 but for truth. Mr. Goltzer said that it's not uncommon for
13 people to mix in truths and falsities. There are no falsities
14 here, your Honor. The evidence will bear that out.

15 I hear a lot of objection because defense doesn't want
16 this video in, but I don't actually see anything that is not
17 trustworthy. Again, the fact that it's a recorded statement of
18 Mr. Burden is by itself, standing by itself trustworthy.

19 THE COURT: Mr. Goltzer.

20 MR. GOLTZER: It isn't George Goltzer who says that
21 people mix truth and falsehood. It's the Supreme Court of the
22 United States that said that. And it's the Supreme Court of
23 the United States that said that as a warning. And what the
24 government is doing is misstating the policies behind the rule
25 as the rule was written.

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1 It is not a question of weight. It is a question of
2 foundation. The rule says specifically, before you can
3 introduce the statement implicating a third party or
4 exculpating a third party, there have to be specific
5 circumstantial guarantees of trustworthiness. That is a matter
6 of foundation. And we have pointed to several weaknesses in
7 the circumstantial guarantees of trustworthiness alleged by the
8 government.

9 The government says the tape is consistent with my
10 theory, and I am going to have somebody testify to my theory.
11 We say there are inherent problems with the people that you are
12 going to have testify, and there are inherent problems with the
13 conversations on the tape, and that the only thing that is
14 against anybody's penal interest on the tape that has any
15 indicia of reliability is the statement "I had two guns and I
16 gave them to somebody." That's it.

17 As far as implicating anybody else, there is a
18 tremendous conflict in the evidence. There are inherent
19 problems on the tape. The two guys can't agree what happened.
20 One of them is getting drunk. That's the antithesis of
21 circumstantial guarantees of trustworthiness. Each of his
22 witnesses is impeachable and will be impeached.

23 The identification of voice that he talks about is
24 laughable. When the jury hears the tape and a witness swears
under oath "I know who they are," they are not going to accept
that in a minute.

25 (Continued on next page)

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1 THE COURT: I'm sorry. What was the last part?

2 MR. GOLTZER: I'm not going to accept it for a minute.

3 We've listened to those tapes, and there is no way you can
4 accurately identify anybody's voice except for Mr. Henry's on
5 that tape. They're going to suggest that Mr. Whitaker bent
6 down and took the phone out of his pocket. When there is no
7 evidence of that? Nobody is going to testify to that? And
8 when the police come in and tell you how they found Mr. Henry,
9 they will tell you that they had to open up his clothing,
10 before there was any blood that was showing, really, and the
11 phone was on the ground. So there is no way anybody would have
12 come into contact with Mr. Henry.

13 It is not a question of weight. That's a whole
14 different issue. The Congress of the United States, in the
15 Advisory Committee and the Rules Committee, that adopted the
16 Federal Rules of Evidence, were very careful to have very
17 limited exceptions to the hearsay rule when people were
18 unavailable. And when the rule was adopted, prior to Crawford
19 v. Washington, one of the reasons for keeping hearsay out was
20 the notion that you couldn't cross-examine it.

21 And Crawford has -- the testimonial notion have
22 changed some of that, but it makes it even more important that
23 the reliability factor be counted. Because there is a whole
24 number of cases that preceded Crawford that talked about
25 reliability and whether something was a firmly-rooted exception

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1 to the hearsay rule, and I think those cases are going to come
2 back.

3 Because Mr. Buchwald is entirely correct in terms of
4 what the government has been trying to do. One of the
5 firmly-rooted exceptions was a co-conspirator statement.
6 That's not what this is. A dying declaration. There is no
7 such thing in this case. This is an inculpatory statement, by
8 an unavailable third party, that is impeachable, unreliable for
9 many reasons both internally and externally. And the
10 government is trying to turn it into a run-of-the-mill
11 evidentiary question when it is a critical evidentiary issue in
12 a murder case having to do with their burden that they haven't
13 met. And it is not enough to say I have witnesses who are
14 going to testify.

15 THE COURT: Well, I mean, it sounds to me,
16 Mr. Goltzer, like you are at least implicitly conceding two
17 branches of the three-part test, that he is unavailable and
18 that the statements that he makes are against penal interest.

19 MR. GOLTZER: I am not conceding that he is
20 unavailable. I think that there are arguments that have been
21 made by my co-counsel that suggest that he hasn't been properly
22 rendered unavailable. And while I am not addressing that, I am
23 not conceding it.

24 MR. BUCHWALD: Let me add just add one more.

25 We have subpoenaed him.

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1 THE COURT: OK.

2 MR. BUCHWALD: His attorney has accepted service. I
3 understand the attorney has said that he would invoke his Fifth
4 Amendment rights. But he is under subpoena, and we are hopeful
5 that the government will decide, in fairness, that they should
6 immunize him because the conviction would stand.

7 THE COURT: Let me cut to the chase on that. I don't
8 imagine -- first of all, I can't make the government immunize
9 him. Neither can you. And the government -- I would assume,
10 Mr. Bauer, is the government going to immunize Mr. Burden?

11 MR. BAUER: No, your Honor.

12 THE COURT: So if he invokes his Fifth Amendment
13 privilege, he's unavailable.

14 Now, what if he testifies? What if he talks to his
15 lawyer and decides he wants to testify?

16 MR. BUCHWALD: Then there are less problems under the
17 Confrontation Clause.

18 THE COURT: There are no problems under the
19 Confrontation Clause.

20 MR. BUCHWALD: Then there are no problems under the
21 Confrontation Clause.

22 THE COURT: OK.

23 MR. GOLTZER: It still doesn't admit the tape because
24 then it becomes bolstering. It's bolstering, your Honor.

25 THE COURT: It depends on what he says. Using the

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1 tape, depending on what he says, could be impeachment.

2 MR. GOLTZER: The Court asked me whether I was
3 conceding that the statements were against his penal interest,
4 and the answer is no.

5 What I am suggesting is that the analysis required by
6 the higher courts is that each portion of the statement be
7 parsed to see if any part of the statement can be construed as
8 being against penal interest.

9 And the only part of the statement that could possibly
10 be construed as being against his penal interest, even though
11 he's using it to minimize his culpability, is the statement
12 that says I had two guns and gave them to someone. But as far
13 as the -- one gun. I'm sorry. One gun. One gun. That's
14 right. It is inconsistent.

15 But he had a gun. He admitted he had a gun on a
16 particular day. That, it seems to me, could be fairly
17 construed as a statement against penal interest. Everything
18 else, no. It is not against his penal interest. Everything
19 else is collateral to that, and is not corroborated by
20 circumstantial guarantees of trustworthiness on this record.

21 THE COURT: OK. I think I understand your
22 corroboration issue. It has to do with what the government has
23 proffered concerning the cooperating witnesses and the defense
24 view that they are inherently impeachable and inherently not
25 able to be relied upon and also the circumstances of the making

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1 of the tape.

2 MR. GOLTZER: Let me give you an example, if I may, of
3 what might be considered corroborating circumstances --
4 circumstantial guarantees of trustworthiness. For example,
5 let's take the notion that Mr. Whitaker arguably had a .38
6 caliber revolver that was chrome in color. If the government
7 had a signed confession by Mr. Whitaker which said on
8 December 15, 2010, I had a .38 caliber chrome revolver and he
9 signed it, and there was a photograph taken by somebody with a
10 telephone from the inside of the apartment that had
11 Mr. Whitaker taking from Mr. Burden a -- or from anybody a .38
12 caliber chrome revolver, I couldn't stand here and say there
13 weren't circumstantial guarantees of trustworthiness. But when
14 you have self-dealing informants who gave inconsistent versions
15 of events, you can't use that to corroborate what's on a tape.
16 It is just not circumstantial guarantees of trustworthiness by
17 any stretch of the imagination.

18 THE COURT: OK.

19 MR. BAUER: Judge, I will let the record lie but for
20 one thing. What we haven't done during this whole discourse is
21 actually dig into the words --

22 THE COURT: Yes. That's what I wanted to get to next.
23 I wanted to get to the second part. What are the statements
24 and are they inherently inculpatory?

25 MR. BAUER: Judge, I would like to focus on Except 4.

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1 I passed it up to Ms. Miller.

2 What the exhibit would be that we contemplate
3 offering, it is a revised version of these excerpts, as
4 reviewed by Jamar Mallory. And as you can see, on the bottom
5 of each page he has initialed them. He has reviewed them and
6 verified their accuracy.

7 Excerpt 4, while I think they should all come in, I
8 think excerpt 4 is the most important, and I can't imagine what
9 is not against penal interests here. So if you look at the
10 first part that Kevin Burden says:

11 "Next thing you know, you go downstairs on the porch
12 and come back like, 'come here.' You like, 'Son, you still got
13 that scat, right?'

14 He talks about how he's got that scat. We all can
15 read, so I'll just kind of summarize. And he says: "I ain't
16 got it right now anyway; it's at my baby's mother house."

17 Right there he's talking about owning a gun, your
18 Honor, and storing it at his baby's mother's house.

19 And then, his next thing that he says, he says: "I
20 just got the scat." And then, "They about, they got a jux,
21 some nice jux lined up."

22 "Jux" is slang for robbery. So now he's saying that
23 he knows that the gun request is about a robbery.

24 And then he says, in the next one, "We got the black
25 joint, I has this chrome joint."

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1 Entirely consistent with what Mr. Mallory is going to
2 say. Mr. Mallory is going to say there was a black gun hidden
3 a baby stroller on the second floor.

4 THE COURT: I'm sorry. Where are you reading now?

5 MR. BAUER: The bottom of -- the first page of excerpt
6 4.

7 THE COURT: OK.

8 MR. BAUER: He has the black joint -- "We got the
9 black joint, I has this chrome joint."

10 Mr. Mallory has -- there is a black gun up on top of
11 the second floor of the house, and Mr. Burden had the chrome
12 gun, which was being stored at his baby's mother's house.

13 "They came later on," and they're hunting them down
14 for the scats.

15 And then Burden says again that his little brother --
16 or her little brother came and brought it in a plastic bag.

17 Entirely consistent with what Mr. Mallory is going to
18 say and, by the way, has said since the outset of the case.

19 And then they have this little interchange about I
20 gave it to you and you gave it to them.

21 And then Mr. Mallory says, "I don't remember."

22 And Burden says, "I gave it to you."

23 And then he says, "You gave the scat to Bow Wow. I
24 gave the scat to you, and then I went in the weed spot. Bow
25 Wow went, Bow Wow went straight upstairs, and I see him goin

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1 upstairs, and I came in right behind them."

2 Now, "upstairs" is consistent because upstairs is how
3 you get into 261st Street. That is the house they are talking
4 about.

5 "And then I was like, 'Who's gone hold my scat?'

6 And then Burden, at the bottom, says that Mallory
7 said, "Oh Gucci or somebody was gonna." And he says, "Hell no.
8 If ain't my drop, I not given them my scat out there." And
9 then that's when Bow Wow says he'll take it.

10 Entirely consistent with multiple witnesses who are
11 going to say that Burden and Bow Wow were close. Bow Wow
12 was -- saw Burden as a mentor, a big brother, and Bow Wow came
13 to that house regularly, which is why he came there with the
14 bloody clothes, by the way, because he trusted Mr. Burden,
15 Mr. Burden trusted him.

16 THE COURT: OK.

17 MR. BAUER: And then if you go to the third page, he
18 says, We didn't know how much, how much they was rollin, to
19 tell you the truth. And that's entirely consistent, too, your
20 Honor. He didn't know how many people were going to be there.
21 They didn't know where they were going.

22 "All I knew was Bow Wow and Gucci. That's all I knew.
23 So I was like let them handle theirs." Which is -- it is an
24 explicit statement that he's giving guns to two people to let
25 them go handle theirs, which he stated earlier was a jux.

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1 So, your Honor, I mean, we can dig into all of these
2 excerpts, but excerpt 4, as you can tell, is probably the most
3 important to the government, and, luckily, I think it is also
4 replete with both trustworthiness and statements against penal
5 interest. And I am just not sure how it could possibly be kept
6 out given the factors of 804(b)(3).

7 MR. GOLTZER: What puts the -- what clearly poses the
8 problem that the government can't overcome is their very own
9 submission, page 10 of their -- and may I quote it very
10 briefly?

11 "In yet another hallmark of trustworthiness, the
12 government points out the back-and-forth between Burden and
13 CW-1" -- Mallory -- "with regards to whom between them --
14 Burden or CW-1" -- Mallory -- "handed the guns to Whitaker and
15 Thomas. As will be clear in CW-1's 3500 material" -- that's
16 Mallory-- "CW-1 originally told the government in
17 January 2012" -- two years later, Judge, not one year later --
18 "that Burden went downstairs" -- "that **Burden** went
19 downstairs" -- "with Thomas and Whitaker and handed them both
20 guns. And in his conversation with Burden in July 2012, he
21 suggests the same sequence of events. Burden then pushed back,
22 stating no, Mallory went upstairs and Mallory handed over a
23 gun. Mallory then agrees. That conversation (along with
24 subsequent conversations with the government) served to refresh
25 Mallory's recollection, who is now prepared to testify" --

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1 years later, by the way, I say parenthetically -- "who is now
2 prepared to testify that after Williams texted about the guns,
3 he went upstairs and retrieved Williams' black .38 caliber
4 firearm from outside his apartment and thereafter handed that
5 gun to Thomas. This variance among versions of the story will
6 surely be a subject of cross-examination for CW-1. But it also
7 serves to show the genuine, trustworthy nature of Burden's
8 recorded statements. And, to be clear, this was not an effort
9 by Burden to shield himself from responsibility. He clearly
10 stated that the 'Chrome 38' was his," and that they were going
11 to use it to do a robbery.

12 MR. BAUER: Judge, defense counsel is focusing on the
13 wrong person here. He is focusing on Mallory. The focus is on
14 Kevin Burden. The focus is on whether what he was saying when
15 he said it, did he believe it to be true.

16 MR. GOLTZER: How he did it.

17 THE COURT: Gentlemen, I need to go upstairs and
18 respond to a jury note. I will be back as soon as I can. It
19 could be 15 minutes or so. So, please, hang tight because we
20 do need to finish this today.

21 MR. GOLTZER: I just need the heads up when you come
22 back, or do it whenever you would like.

23 THE COURT: When I come back.

24 THE CLERK: All rise.

25 (Recess)

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(Time noted at 4:30 p.m., defendants present)

THE COURT: OK. So we are all back. I do apologize. I can't promise you that it won't happen again because the jury may want to be done with their work before 5 o'clock.

But where were we?

MR. GOLTZER: I think I had just read to your Honor from page 10 of the government's submission in opposition to our motion to preclude, where it became apparent that Mr. Mallory was changing his testimony in an attempt to conform to that which appeared on the tape. But it's still very clear -- and Mr. Downing explained it very clearly; I'm grateful to him for it -- that there is still a major contradiction between the most current version of Mr. Mallory's testimony and what's on the tape.

Mallory now says I gave the black gun to Mr. Thomas, which he got from L-1, Mr. Williams, not from Mr. Burden. And he's telling Burden, who he is going to say that Burden gave the .38 caliber silver or chrome revolver to Mr. Whitaker, but Mr. Burden is still saying no, you gave the gun to Bow Wow. So there's that inherent contradiction that still remains even though this impeachable witness is trying to conform his testimony to what he thinks will be on the tape.

It's convenient because that sort of supports the government's theory that the tape is in some way reliable. But the declarant is not reliable. And the problem with the notion

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1 of corroborating circumstances is you have an informant who is
2 trying to refresh the recollection of a guy who is drinking on
3 the tape for two hours. And the informant, if he was a
4 reliable human being, would remember what happened and wouldn't
5 have to have his recollection refreshed much, much later.

6 If I handed you a gun, Judge, I would remember it
7 correctly. I wouldn't have to have my recollection refreshed
8 that Don Buchwald handed you the gun.

9 So the government misapplies the rule. The government
10 isn't properly separating the corroborating circumstances from
11 the statement itself. The statement can say anything. It
12 doesn't mean it is corroborated reliably. And what's missing
13 here is the reliable corroboration.

14 MR. BAUER: Judge, I'll just say what I said before
15 and then I would be happy to move on to the rest of our agenda.

16 I think they are focusing on the wrong person,
17 Mr. Mallory, when we should be focusing on Mr. Burden and what
18 he said and whether what he said he thought was true at the
19 time.

20 To the extent that there is a discrepancy between
21 which gun Mr. Mallory gave, I would hesitate to call it a major
22 discrepancy when the entire thesis of the point, which is that
23 they had guns at the house. L-1 called to get them. Bow Wow
24 and Gucci came over. That was entirely consistent. So I would
25 hesitate to call that major, I think, given the entirety of

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1 especially excerpt 4, it is entirely trustworthy.

2 MR. GOLTZER: Judge, I have to focus on Mallory as far
3 as the corroborating circumstances are concerned because you
4 are going to find that Burden is unavailable.

5 THE COURT: OK. I have read the parties' submissions,
6 and I think I believe I understand the parties' positions.

7 Let me tell you where I come down. I think, first of
8 all, that the government has sufficiently established that
9 Mr. Burden is unavailable.

10 I think -- well, with respect to whether or not these
11 statements are against penal interest, I've read these excerpts
12 many times. They are not English as far as I understand it, so
13 I have to depend on the government's translation of these
14 statements. If their translations are accurate, then I believe
15 that they will establish that these statements are against
16 Mr. Burden's penal interest.

17 With respect to the corroboration, I do believe that
18 if the government's witnesses testify as has been indicated, as
19 has been proffered, that ultimately the tape will be admitted.
20 However, I want to reserve decision until we've heard from
21 competent witnesses as to what these words mean and what the
22 testimony of the cooperating witnesses are.

23 Just because -- by the way, it is also my view, just
24 to give you my thoughts on it, that just because cooperating
25 witnesses are subject to impeachment and just because they can

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1 be, you know, impeached in a variety of different ways does not
2 mean that they are unable to give corroboration to the facts as
3 admitted to by Mr. Burden on these tapes.

4 So subject to further testimony of the government's
5 cooperating witnesses, the government's motion will be granted
6 and the defendant's motion denied. But it will be subject to
7 that additional testimony.

8 MR. GOLTZER: Do you think there won't be reference to
9 it in opening?

10 THE COURT: Yes. It ought not be referenced to in
11 opening.

12 MR. BAUER: That's fine. We won't open on it.

13 Just in terms of mechanically, your Honor, the plan
14 was to show Mr. Mallory the video and admit it through him.

15 So I guess what I would propose, in line with your
16 ruling, is that the government elicit the version of the facts
17 from Mr. Mallory and then take a short break, either at a
18 sidebar, or otherwise for the parties to check in with your
19 Honor to make sure that those corroborating circumstances have
20 been met. But it will be somewhat realtime is my point,
21 because the plan was to show it to the very witness who I think
22 you are suggesting you want to hear.

23 THE COURT: When do you propose Mr. Mallory will
24 testify?

25 MR. BAUER: So the plan is Anthony Baynes is going to

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1 be our first cooperate witness. We think he will get on by the
2 end of the first day, and then Mr. Mallory was going to be our
3 second witness. We figured -- I think our guesstimate was, you
4 know, without knowing exactly how long Mr. Baynes will be
5 cross-examined --

6 THE COURT: Sound like a lot.

7 MR. BAUER: It sounds like a lot. So let's say
8 Thursday would be our estimate for Mr. Mallory.

9 THE COURT: Very well.

10 MR. BAUER: So if it is OK with your Honor, what I
11 would suggest is I ask Mr. Mallory the questions about what had
12 happened, then take a brief break for the parties and the Court
13 to check in.

14 THE COURT: OK.

15 MR. GOLTZER: Does your Honor expect that we will get
16 to openings on Monday?

17 THE COURT: Well --

18 MR. GOLTZER: You know better than I do.

19 THE COURT: It is my hope. Obviously, we are going to
20 work our way through a lot of juror.s, I believe it is a
21 three-week trial. It is an August trial. It is a trial that
22 involves a murder. So there will be a lot of questioning that
23 will need to be done. I hope to be done on Monday, but I can
24 foresee a scenario where we don't have a jury until Tuesday
25 midday.

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1 MR. GOLTZER: Can we agree, if it is agreeable to the
2 Court, that we will not open on Monday, in view of that
3 estimate, and we can plan on a Tuesday opening so that they are
4 not bifurcated?

5 THE COURT: Yes. If we get to a point in the day
6 where it appears as though all the parties won't be able to
7 open, we can certainly do that.

8 MR. GOLTZER: Thank you.

9 MR. BAUER: Thank you, your Honor.

10 So, I guess along those lines, then, your Honor, is it
11 fair to say that it's OK with your Honor that we not have any
12 witnesses ready for Monday but rather for first thing Tuesday
13 morning?

14 THE COURT: I can't imagine that we will have
15 witnesses to put on -- that we will have time to put any
16 witness on on Monday.

17 MR. BAUER: OK. Thank you.

18 THE COURT: OK. Next. The government's motion to
19 preclude the cross-examination regarding the law enforcement
20 witnesses.

21 Mr. Bauer.

22 MR. BAUER: Yes, your Honor. I was going to hopefully
23 streamline this a bit, which is that some of the officers for
24 whom we had submitted will not be testifying, or we don't think
25 will be testifying. So I don't think we need to use the

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1 Court's time.

2 So what I would suggest is that we go through each of
3 the subsections that the government laid out, and then I could
4 advise whether or not that section is not necessary.

5 THE COURT: OK.

6 MR. BAUER: So Section 3 is necessary. Detective
7 Frederick and the two Officer Lahars will be testifying. So,
8 your Honor, I don't think that we need to make additional
9 argument unless your Honor disagrees with regard to number 3.

10 THE COURT: All right. And number 3 concerns --

11 MR. BAUER: I'm sorry. It is on page 21, the
12 preclusion of cross-examination regarding the conviction of
13 Thomas Douglass.

14 THE COURT: OK. And those officers will not be
15 testifying?

16 MR. BAUER: They will be testifying.

17 THE COURT: OK.

18 MR. BAUER: So that's why we should come to a ruling
19 on this point for number 3.

20 THE COURT: OK. And does someone want to speak for
21 the defense with respect to that category?

22 MR. BAUER: Your Honor, the government's argument is
23 pretty much the same for each of these. There have been no
24 adverse credibility findings. The underlying events are
25 irrelevant and would otherwise be prejudicial.

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1 (Pause)

2 MR. GREENFIELD: Your Honor, if I might address some
3 of these witnesses?

4 I don't think we have enough information with regard
5 to some of these witnesses yet as to where we are going as to
6 credibility and their trustworthiness. If it turns out during
7 the course of trial that one of these witnesses may have done
8 something in the course of this investigation which puts his
9 credibility and trustworthiness into question, then I think the
10 Court might want to reconsider any ruling it made now.

11 I would just ask the Court to hold in abeyance any
12 such ruling on any of these three witnesses until we proceed
13 further into the trial.

14 THE COURT: These are motions in limine, and motions
15 in limine are always subject to reconsideration, you know, in
16 light of the testimony as it might develop at trial. So that I
17 think goes without saying.

18 However, based on the government's proffer that the
19 officers that would be testifying here are merely witnesses,
20 and witnesses only to the extent that they were present before
21 Mr. Douglass left a particular event and did not otherwise --
22 or were not otherwise found to have provided any false
23 testimony and there was no adverse credibility finding as to
24 their testimony, I don't see why this would be fair ground for
25 cross-examination. So the government's motion is granted with

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1 respect to this category of evidence.

2 MR. GOLTZER: May I have one caveat, Judge, very
3 briefly?

4 THE COURT: Sure.

5 MR. GOLTZER: The government mentioned a no
6 credibility -- adverse credibility finding, and I accept their
7 representation. If, however, the government learns that there
8 were statements given by any of these witnesses that were not
9 subjected to credibility findings, that were consistent with
10 the false statements made by the defendant in the case, then
11 that would be Brady and we should get it, because it would go
12 to the honesty and veracity of the witnesses who are testifying
13 here.

14 Am I clear on that? Did I make myself clear?

15 THE COURT: Are you saying that if Officer Douglass
16 provided a statement which was thereafter determined to be
17 false --

18 MR. GOLTZER: Which was consistent -- which was
19 supported by other means, falsely, even though there were no
20 adverse credibility findings, we should get that.

21 THE COURT: OK. I don't know how you find that one
22 officer lied about a particular fact and other officers who
23 testified about it or gave evidence about the same fact
24 consistently did not lie. So I guess I don't know that the
25 scenario that you propose is possible.

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1 MR. GOLTZER: It is not unheard of for police officers
2 to falsely corroborate each other. So the guy who was a
3 defendant filed a false insurance claim as to how the accident
4 occurred and one of the witnesses in this case falsely
5 corroborated his statement, even though there are no adverse
6 credibility findings, it would be a good faith basis for us to
7 impeach the officer with an act of dishonesty.

8 THE COURT: OK.

9 MR. GOLTZER: That's our Brady request, if they find
10 out about that.

11 THE COURT: OK.

12 MR. BAUER: I'm not sure it is Brady or if it is
13 Giglio, your Honor. But we made reasonable efforts to get
14 information with regards to these events. I'm not sure when
15 and how we might find additional statements by the officers,
16 but I will -- I absolutely agree with the fundamental premise
17 of Mr. Goltzer, which is that if we find anything regarding the
18 witnesses' credibility, statements that would otherwise allow
19 them to be impeached, then we will turn them over
20 expeditiously.

21 THE COURT: OK.

22 MR. BAUER: So moving on to number 4.

23 THE COURT: Right.

24 MR. BAUER: OK. Number 4 does apply because Detective
25 Pete Frederick will be testifying. Again, I will -- it is the

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1 same argument from the government.

2 THE COURT: OK. Gentlemen?

3 (Pause)

4 MR. BAUER: Judge, maybe we can streamline this whole
5 process. It is the same basic argument.

6 So the government, we would move your Honor to grant
7 our motion for numbers 4 in our motion. Number 5 does not
8 apply because the officers involved -- or Officer Anthony
9 Guidice is likely not testifying.

10 Number 6. Detective Steven Bunt is likely not
11 testifying, at least not as a government witness.

12 And then 7. Number 7 does apply for Peter Frederick.

13 As I said, it does not apply for number 8. That was
14 Anthony Guidice, as I had said.

15 And it does apply for number 9, Kevin Lahar.

16 The government would move the Court to grant the
17 government's motion to preclude cross-examination on the
18 subjects at issue. And the government is happy to concede that
19 should defense counsel wish to revisit this, then they can at
20 any point as the particular officer's testimony nears.

21 THE COURT: OK. The government's motion is granted
22 with respect to all of those categories of cross-examination.

23 OK. Next, 404(b). Now, as I understand it, there are
24 two categories of 404(b). One category the government, I
25 believe, asserts is not 404(b) evidence, really, but evidence

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1 of the underlying charges. Is that correct?

2 MR. NAWADAY: That's correct, your Honor. I think it
3 is fairly clearly set forth in the government's papers that the
4 evidence of the robberies that we expect the cooperating
5 witnesses testify about, that these defendants participated as
6 well as the gun possession -- of the gun possession --
7 instances of gun possession by these defendants are all,
8 frankly, direct evidence of the charged conspiracy, the
9 narcotics conspiracy, as well as the 924(c) charges.

10 And the reason for that is, first, for the 924(c)
11 charge relating to carrying a gun in connection with narcotics
12 trafficking, we have to prove that these defendants carried
13 guns. So the fact that we will have Mr. Baynes, for example,
14 who will be testifying about seeing a gun that Mr. Christian
15 carried, without being present, but Mr. Christian in carrying a
16 gun during a robbery of a drug dealer, those are all direct
17 evidence of the fact that Mr. Christian carried a gun in
18 furtherance of a drug transaction.

19 THE COURT: Are those incidents within the time period
20 alleged in the Indictment?

21 MR. NAWADAY: It is within the time period alleged
22 with respect to the 924(c) count as well as the time period
23 alleged with respect to the narcotics conspiracy count.

24 THE COURT: OK. Gentlemen?

25 MR. BUCHWALD: There is one instance, your Honor --

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1 largely a couple, but one I would like to address first, which
2 has to do with what again is proffered testimony from a witness
3 by the name of Daniella Williams, who, as I understand it, will
4 testify that at some point Mr. Christian was extorting her for
5 the protection money so that he wouldn't hurt her son, who he
6 was angry at because her son had a white mother -- namely her.
7 And so she was threatened, I gather, by Mr. Christian to pay
8 \$400 whenever she saw him. And on one occasion she saw him and
9 he had a gun and he -- she asked, Why do you have a gun? And
10 he then handed the gun to who the government claims is
11 Mr. Thomas.

12 That's all we know from the 3500. But it seems to me
13 it has nothing to do with anything except perhaps to show
14 propensity that sometimes Mr. Thomas has a gun. They already
15 and separately tried to put in evidence about Mr. Thomas' gun
16 possession, the instance where Mr. Thomas has already been
17 convicted and sentenced by your Honor for gun possession in
18 February of 2011, which I'll separately address. But certainly
19 if that was coming in -- and we don't think it should -- there
20 is no need for this, and all it does is show propensity. It
21 has nothing to do with the underlying charges. It is just,
22 "Wow, this guy has a gun."

23 THE COURT: Mr. Nawaday, with respect to that
24 particular incident?

25 MR. NAWADAY: Your Honor, with respect to that

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1 particular instance, we still submit that it is direct evidence
2 of the possession of a firearm in furtherance of a drug
3 conspiracy because it shows -- because Ms. Williams will also
4 testify that she saw the defendant dealing drugs during this
5 time period.

6 MR. BUCHWALD: Christian.

7 MR. NAWADAY: Christian.

8 MR. BUCHWALD: Not Thomas.

9 MR. NAWADAY: Right. But we can't separate out the
10 facts of what actually happened and pretend that your client
11 wasn't there. She has to testify honestly about who was there.
12 That is number one.

13 And number two. It also proves -- it goes towards the
14 404(b) line of argument. It shows identity. It shows
15 something offered for propensity. It shows that Mr. Christian,
16 "Reckless," and Mr. Thomas know each other.

17 THE COURT: OK. I think that that can come in as
18 evidence of the government's case in chief as to the charged
19 gun count. So the government's -- or, rather, the defendants'
20 motion in that regard is denied.

21 Now, what about the actual 404(b) evidence? Talk to
22 me about Thomas' crack sales from 2007. Isn't that -- why
23 should those come in?

24 MR. STRAZZA: Your Honor, I don't mean to interrupt,
25 but before we move on from all of the evidence of the prior

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1 uncharged crimes, are we separating it between that and the
2 404(b) stuff? How do you want to address that?

3 THE COURT: The government indicates that some of the
4 crimes that have been referred to as 404(b) are actually direct
5 evidence of the charges in the Indictment. So I want to
6 separate those out. And it appears to me, based on the
7 submissions that have been made, that the government has
8 established that those arguably are direct evidence.

9 MR. STRAZZA: So I guess I'll just note my objection
10 to that. I wanted -- the government made a submission last
11 night --

12 THE COURT: OK.

13 MR. STRAZZA: -- with respect to specific instances
14 and --

15 THE COURT: So go ahead. Absolutely. Make your
16 record.

17 MR. STRAZZA: With respect to all of the incidents in
18 general, we submit that the prejudicial effect outweighs the
19 probative value. But with respect specifically to incidents
20 number 4, 5, 6, 7 and 8, we submit that the reasons the
21 government provided -- namely, four reasons -- are not met.

22 And I guess we can go one by one, if you want, or I
23 can --

24 THE COURT: Please. Absolutely.

25 MR. STRAZZA: OK. So with respect to incident number

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1 4, it notes that Mr. Christian went with at least three others
2 to rob an individual named Smurf and then when the victim
3 refused, one of them, who was not Mr. Christian, shot at him, I
4 don't see how that would go towards any -- to establish any
5 narcotics conspiracy. I don't see how the firearm in question
6 there relates to any narcotics conspiracy. It's not Giglio
7 material for any of the witnesses who are going to testify at
8 this trial. And I don't see how it establishes a relationship
9 between any of the co-conspirators here.

10 THE COURT: OK. Mr. Nawaday.

11 MR. NAWADAY: Yes, your Honor. With respect to each
12 of these shootings, first, again, these are instances in
13 which -- through, actually, I believe it is the testimony of
14 Mr. Baynes, because he was present and was told about these by
15 Mr. Christian -- actually, I think he was present at most of
16 these shootings, so it goes to the fact that Mr. Christian
17 possessed a firearm during the period that he was trafficking
18 in narcotics. So that's number one. That's why it's direct
19 evidence.

20 Two. On the prejudicial point. There is nothing more
21 prejudicial about these specific instances and these
22 shootings -- if anything, they are less prejudicial than the
23 facts of the present case. So, for instance, one, there is a
24 fight -- and this is instance number 5 on page 3. There is a
25 fight at a party. He pulls out a gun and shoots in the air.

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1 And, third, this is Giglio with respect to Mr. Baynes.
2 He's present at these shootings. He's there while it occurs.
3 And, also, it also shows the mutual trust between the
4 cooperating witness and Mr. Christian. It shows how they know
5 each other. It shows they trust each other, enough that
6 Mr. Baynes is right next to Mr. Christian during shootings.
7 And Mr. Christian trusts Mr. Baynes to be next to him. And
8 that -- frankly, that's part of their history. That's why they
9 trust each other. They don't just show up on the day of the
10 murder of Mr. Henry to suddenly first meet and suddenly engage
11 in a very serious crime.

12 THE COURT: OK.

13 MR. STRAZZA: And I just want to be clear. Is it the
14 government's position that Mr. Baynes was present during each
15 and every one of the instances that I specifically mentioned?

16 THE COURT: I don't know.

17 Mr. Nawaday.

18 MR. NAWADAY: From my recollection -- I can confirm
19 this -- that he was there for number 5, for number 6, number 7,
20 number 8 --

21 MR. STRAZZA: The only one I mentioned was number 4.

22 MR. NAWADAY: Number 4, I would have to check. That
23 may be one in which it was relayed to Mr. Baynes by
24 Mr. Christian as an admission of what had occurred.

25 THE COURT: OK.

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1 MR. STRAZZA: One final point, your Honor. I won't
2 beat a dead horse. But it is our position that just because
3 Mr. Christian -- or it may show that Mr. Christian had a
4 firearm at this specific period in time, it has nothing to do
5 with the facts, as I see them here, it has nothing to do with
6 any involvement in a narcotics conspiracy, and I think there
7 has to be a nexus there for the 924(c) count.

8 MR. NAWADAY: Your Honor, it is one of the elements
9 that he possessed a gun in furtherance of a narcotics
10 conspiracy, absolutely. Our other proof will show that during
11 this time period he was dealing drugs. So I think this is
12 evidence that tends to show that he possessed a gun and it was
13 in furtherance of his narcotics conspiracy.

14 In addition, I believe some of these -- the instance
15 number 8 on page 3 relates to a shooting or shot in the air of
16 another rival drug dealer.

17 THE COURT: OK. So I do grant the government's motion
18 that these incidents can come in in their case in chief as
19 direct evidence of the charges in the Indictment.

20 Mr. Buchwald.

21 MR. BUCHWALD: Your Honor, they proffer evidence of a
22 robbery of someone at a dice game. I forget who it is to be
23 elicited from.

24 That's number what?

25 MR. NAWADAY: 13.

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1 MR. BUCHWALD: Number 13. And I don't know what it
2 has to do with other than I guess it shows that he has a gun.
3 Is that what it is offered for? To show propensity to have a
4 gun?

5 It has nothing to do with narcotics. Nothing to do
6 with -- unless the dice game is going to involve interstate
7 commerce. I doubt it.

8 MR. NAWADAY: Your Honor, again, it's to prove that he
9 did possess a gun during the conspiracy period. We will have
10 other evidence that he was a drug dealer during that period.

11 In addition, under a 404(b) analysis, it shows
12 identity insofar as it's at the direction of one of the
13 co-conspirators in the charged murder conspiracy.

14 James Williams is L-1. He's the individual who
15 directed Thomas and Tyrell Whitaker to go to the cooperating
16 witness Jamar Mallory and Kevin Burden to get guns the night of
17 the shooting of Mr. Henry.

18 THE COURT: OK. Very well. That also will be
19 admitted.

20 I have to run upstairs because there is a flurry of
21 notes from the jury, unfortunately.

22 Is it possible to keep the defendants here?

23 THE MARSHAL: Yes, your Honor.

24 THE COURT: I do apologize.

25 (Recess)

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1 THE COURT: Where were we? Did anyone else wish to
2 speak with respect to the so-called 404(b) evidence that the
3 government is alleging can come in under as evidence of its
4 case in chief?

5 MR. GOLTZER: I have a matter if everybody else is
6 finished.

7 THE COURT: I'm sorry?

8 MR. GOLTZER: If everyone is finished, I have a matter
9 to discuss.

10 MR BUCHWALD: There are other pieces.

11 THE COURT: Right. So if anyone else wishes to be
12 heard, I'm happy to hear you.

13 MR. GOLTZER: Your Honor may recall when we were
14 litigating the adult/juvenile litigation, there was an open
15 case of misdemeanor possession of drugs against Mr. Whitaker,
16 and I have a laboratory report. He was arrested on August 12
17 of 2010 with six glassine envelopes of heroin, according to the
18 laboratory report, item 2A.1 is one glassine envelope of heroin
19 with one one-thousandth of a gram. Now, a gram is one
20 Sweet-N-Low pack. So this is one one-thousandth of a
21 Sweet-N-Low packet, and there were six of those. Mr. Whitaker
22 is not charged with a narcotics conspiracy, nor could he be.
23 He is not alleged to have done this with anyone, and prejudice
24 substantially outweighs any probative value of his possession
25 of an amount of heroin that is absolutely consistent with

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1 misdemeanor personal use.

2 If your Honor likes, I will hand up the -- so it does
3 nothing but paint him as either an addict or a dealer when he's
4 not charged with a drug conspiracy, and, most critically, there
5 is nothing in this particular arrest that would lead anyone to
6 believe that it was concerning activity on that date as opposed
7 to his own individual possession. So there is really nothing
8 that this does except bring out his propensity and prejudice
9 him in the context of this particular case. So I think the
10 application to admit it should be denied.

11 THE COURT: Is there an application to admit that
12 evidence?

13 MR. GOLTZER: It was mentioned in the memorandum.

14 MR. NAWADAY: Yes, your Honor, there is. I think the
15 broader point, which I'd like to start with, and I think
16 Mr. Goltzer is making is the fact that Mr. Whitaker is not
17 charged in a narcotics conspiracy. He is not. In fact, he
18 cannot be charged in the narcotics conspiracy as charged in
19 this indictment because a juvenile can't agree to do something
20 with somebody else.

21 THE COURT: OK.

22 MR. NAWADAY: That said, an element of the 924(c) drug
23 count, basically the 924(c) possession of a firearm in
24 furtherance of a drug conspiracy charge, in that count
25 Mr. Whitaker is charged and can be charged. One of the

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1 elements is proving that he carried a gun -- we have to prove
2 that he carried a drug in furtherance of drug conspiracy. So
3 we do have to present evidence in order to prove the 924(c)
4 drug count against Mr. Whitaker that he was carrying a gun in
5 furtherance of a drug conspiracy. So we do have to present
6 evidence that Mr. Whitaker was dealing drugs during the
7 conspiracy period.

8 Our evidence will show that -- and we are planning to
9 introduce that specific instance of the conduct relating to
10 Mr. Whitaker's possession of heroin. Cooperator will testify
11 that they had seen Mr. Whitaker selling both crack cocaine and
12 heroin during the charged conspiracy period.

13 THE COURT: When did this incident take place?

14 MR. NAWADAY: That incident took place, I believe, in
15 2010, which is within the conspiracy period of the narcotics
16 conspiracy and the period in which it is alleged that
17 Mr. Whitaker possessed a firearm in furtherance of a narcotics
18 conspiracy. That period is 2008 to 2012.

19 MR. GOLTZER: I just wanted to alert the Court to an
20 issue that we are going to be researching over the weekend. I
21 am unaware of any evidence -- and I've mentioned this to the
22 government. Having reviewed the 3500 material, I am unaware of
23 any evidence at all that Mr. Whitaker allegedly possessed a
24 weapon other than the weapon that he allegedly possessed during
25 the robbery on December 15.

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1 If that is the case, there would be concurrent counts,
2 number one, and there should be an election made. We're not up
3 to that Rule 29 motion. But the count as alleged, and the
4 statute as written, requires that the narcotics conspiracy,
5 which is involved with the alleged possession of the weapon, of
6 the 924(c), be one that is chargeable in a federal court.
7 Mr. Whitaker is not chargeable. Now, I have to determine -- we
8 have to determine over the weekend whether the conspiracy is
9 the conspiracy or the defendant that has to be chargeable. We
10 are going to take the position that it's the defendant. So
11 because Mr. Whitaker is not chargeable, we don't think that
12 924(c) count can stand, and we will have more to say about it.
13 If that count falls, clearly, this shouldn't come in. If the
14 count doesn't fall, then I know what the Court's ruling is
15 going to be over my objection.

16 THE COURT: Correct.

17 MR. NAWADAY: I will leave what Mr. Goltzer just said
18 to the side, but, in addition, the evidence of Mr. Whitaker's
19 narcotics trafficking during the period 2008 to 2012 is also
20 relevant to show his relationship with the other defendants and
21 co-conspirators in the case. The evidence will show that
22 Mr. Whitaker was dealing drugs, crack cocaine and heroin, with
23 certain of the other co-conspirators and cooperating witnesses
24 in the various areas of Newburgh that will be the subject of
25 the evidence of the case.

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1 MR. GOLTZER: Of course, this particular incident
2 involving a miniscule amount of heroin in somebody's pocket
3 doesn't do that at all because there is no allegation that
4 anybody else was involved. I just wanted to make that clear
5 for the record.

6 THE COURT: It also raises an issue that I -- I don't
7 know if the parties have given any thought to, but whether
8 there should be some sort of limiting instruction when some of
9 this evidence comes in concerning Mr. Whitaker.

10 MR. GOLTZER: Well, there should be limiting
11 instructions I think when the evidence -- the jury should be
12 told very clearly that Mr. Whitaker is not charged with being a
13 member of a narcotics conspiracy. The government is offering
14 it for limited purposes and the government should propose what
15 those exact limiting purposes are. In addition, there should
16 be a limiting instruction, for example, if the Court is
17 permitting evidence of other crimes of violence or gun
18 possessions by co-defendants of Mr. Whitaker, that is 404(b)
19 evidence and not evidence of a conspiracy, we would request an
20 instruction that the jury be told this evidence is not
21 admissible against Mr. Whitaker. I assume other defendants
22 might have the same request at appropriate times.

23 THE COURT: Right. I would ask the defense to provide
24 me with proposed limiting instructions along those lines.

25 MR. NAWADAY: Your Honor, unless there are other

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1 instances --

2 MR BUCHWALD: We've stated our objections in the
3 letter including the 2007 drugs, the gun possession for which
4 he was convicted, and that arises out of February 28, 2011, so
5 we are not conceding those. We think all it does is show
6 propensity.

7 MR. GOLTZER: I had raised the same issue with respect
8 to a robbery that Mr. Whitaker allegedly committed in late
9 2010. I put it in my letter raising an objection under 403.
10 It's on page 3. I spoke to the government about this not too
11 long ago. As I read the 3500 material, I had only noticed
12 reference to this particular act in one cooperator's 3500
13 material. The government advised me that it was, in fact, in
14 two cooperators' 3500 material. I could be wrong.

15 My recollection -- and, again, it was a quick perusal
16 of that particular witness -- and there is a point I'm making.
17 Under the Supreme Court's decision in *Huddleston v. The United*
18 *States*, before the government can introduce evidence such as
19 this, there has to be a rational basis, at least by a
20 preponderance, for which a jury could find that it actually
21 happened. My recollection of the 3500 material -- and maybe
22 the government wants to make a proffer to contradict it -- is
23 that it is claimed that Mr. Whitaker made a phone call to set
24 somebody up, and then it was the other person who ripped him
25 off. And from my reading of the 3500, I wasn't prepared to

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1 admit a sufficient foundation under *Huddleston* because it
2 seemed very, very thin. Now Mr. Bauer may have more
3 information.

4 MR. BAUER: Your Honor, just to add clarity to that.
5 Both Mr. Mallory and Mr. McDermott.

6 THE COURT: I'm sorry, both Mr. Mallory and?

7 MR. BAUER: Mr. McDermott are going to testify about a
8 robbery that Tyrell Whitaker did with Kevin Burden at 260 First
9 Street in late 2010 where they called an ecstasy dealer from
10 Newburgh, invited him over to the house under the guise that
11 there was going to be -- they were going to buy some ecstasy;
12 and when he got there, both Mr. Burden and Mr. Whitaker
13 physically assaulted him, stealing approximately 150 ecstasy
14 pills. They then split up the ecstasy pills, and Kevin Burden
15 actually sold those ecstasy pills to Jamar Mallory for Mallory
16 to resell while Whitaker took his -- presumably to resell, but
17 I don't think we actually know what he did with them. We did
18 assume a large quantity, 75 or so ecstasy pills, are greater
19 than personal use. That's the evidence we're talking about.
20 It's far from thin. We have two cooperators who are going to
21 testify almost identically on the incident.

22 MR. GOLTZER: If the proffer is accurate, then under
23 *Huddleston* it comes in, but I didn't see that in the 3500
24 material.

25 THE COURT: Very well. Anything else?

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1 MR. BAUER: Judge, just to be clear, what we still
2 have left to do, it sounds like for Tyrell Whitaker, it sounds
3 like the way we left it is Mr. Goltzer is going to do some
4 research over the weekend, but unless we hear otherwise from
5 Mr. Goltzer, are we all concluding that the evidence of
6 Mr. Whitaker's drug trafficking comes in or did I miss that?

7 THE COURT: Well, the Court's ruling is that it comes
8 in. Again, this is all subject to revisiting.

9 MR. BAUER: Then I think the --

10 MR. GOLTZER: Does that include the one-thousandth of
11 a gram of heroin?

12 THE COURT: It does.

13 MR. BAUER: So, I think that leaves the Glenn Thomas
14 2007 crack sales, which I think Mr. Nawaday can speak to.

15 THE COURT: OK.

16 MR. BAUER: And I believe the only other thing is
17 Mr. Goltzer had raised an argument about participation, the
18 defendant's participation in various Newburgh gangs.

19 THE COURT: OK.

20 MR. NAWADAY: Your Honor, this evidence of Glenn
21 Thomas' crack sales from 2007, they are outside the conspiracy
22 period that is charged, so it would have to come in under Rule
23 404(b). Our argument of why it should come in is set forth on
24 page 6, for example, of our reply papers. In brief, that
25 evidence shows that Glenn Thomas had an opportunity to have

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1 knowledge of how to deal crack cocaine and about the specific
2 areas in Newburgh where crack cocaine was typically sold.
3 Those purchases of crack cocaine that we want to prove up in
4 2007 occurred in and around these same areas that we will have
5 evidence showing that crack sales were done in Newburgh during
6 the conspiracy period.

7 THE COURT: Let me ask you this, Mr. Nawaday. I mean,
8 I don't know the evidence in this case. I haven't seen the
9 3500 material. Do you, strictly speaking, need this? Isn't
10 there going to be -- it sounds like there is going to be plenty
11 of evidence from plenty of cooperators that Mr. Thomas during
12 the periods actually alleged in the indictment sold drugs,
13 stole drugs, etc.

14 MR. NAWADAY: To be fair, your Honor, there will be
15 evidence during the conspiracy period from cooperators saying
16 that Glenn Thomas sold drugs in these specific areas of
17 Newburgh, but it is the government's burden, and, frankly, we
18 like to have as much evidence as we can. We think that under
19 Rule 404(b) such evidence of other crack sales that occurred in
20 a similar area of Newburgh by Mr. Thomas just one year before
21 shows his knowledge and opportunity and his intent to deal in
22 crack cocaine in those areas during the charged conspiracy
23 period.

24 THE COURT: I know that I got a letter from one of the
25 defense lawyers who -- and I don't know whether it was

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1 Mr. Thomas' lawyer, I don't remember offhand -- who said "To be
2 clear, there will be no defense based on the various areas for
3 which 404(b) can be admitted."

4 Was that you, Mr. Buchwald?

5 MR BUCHWALD: Yes.

6 THE COURT: Are you Mr. Thomas' lawyer?

7 MR BUCHWALD: Yes.

8 THE COURT: Now, in light of that proffer,
9 Mr. Nawaday, I think that what I will do with respect to that
10 line of inquiry, I will deny it without any prejudice to the
11 government to revisit at the appropriate time. So you should
12 not open on that topic.

13 MR. BAUER: Absolutely, your Honor.

14 I think the next matter is the gang affiliation.

15 THE COURT: OK.

16 MR. NAWADAY: I think we set that forth in the
17 admissibility of gang association/affiliation in our papers.
18 It goes to the history and relationship between these
19 defendants and the cooperating witnesses in the case. That's
20 how they know each other, that's how they trust each other, and
21 for those reasons, we do believe that it is admissible.

22 In addition, the cooperating witnesses will have to
23 testify about their own gang affiliation. So we will have to
24 draw that out in our direct examination, as we are allowed to
25 do, to pull the sting on any Giglio.

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1 MR. GOLTZER: We take a different position. Perhaps
2 the best argument that it shouldn't come in is the fact that
3 Mr. Christian is not alleged to be a Blood. He's alleged to be
4 in a different group. So there is no concerted gang activity
5 which is part and parcel of the indictment in this case. There
6 was no robbery or shooting because of gang situation.

7 The government has already proffered substantial
8 evidence that these people knew each other. There is going to
9 be a lot of testimony about how they knew each other. There is
10 going to be drug dealing testimony about how they knew each
11 other. There are going to be -- the Court's ruled on a tape
12 that show how they know each other.

13 Gang evidence is extraordinarily inflammatory because
14 jurors have preconceived notions about gang activity that isn't
15 necessarily accurate and that is inflammatory. The cases we
16 cited where gang evidence was admitted had to do with violent
17 actions induced by the membership in a gang. The other
18 circuits routinely held that your membership in a gang didn't
19 mean that you were more inclined to commit a crime as an
20 accomplice with somebody else in the gang.

21 That's not this case. This case is entirely
22 different. And the fact that their witnesses may or may not
23 have been in a gang shouldn't impact upon our clients. They
24 are entitled to a fair trial under different rules of evidence.

25 If their witnesses committed acts or have a status --

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1 by the way, I don't think that their witnesses' mere membership
2 in a gang is something that ought to come out to impeach them.
3 I don't care if he's a Blood or a Crip or a Latin King. People
4 join gangs for a variety of reasons. If they committed immoral
5 and vicious acts as members of a gang because they were in a
6 gang; for example, if a gang said we're having a fight with
7 MS13 on First and Landers Street, that should come in. But
8 absent that, we have a robbery charge, we have gun charges,
9 there are discrete charges that have nothing to do with a gang.
10 And to introduce the evidence of a gang based upon the
11 authorities we've cited in my memorandum, we are denied then a
12 fair trial and due process.

13 MR BUCHWALD: Your Honor, in that regard, if I might,
14 I believe the government concedes that Mr. Thomas was not a
15 Blood. He was a Crip or associated with Crips at the time, for
16 example, of the 2007 cocaine sales that are now excluded. He's
17 wearing Crip uniforms, Crip regalia. He is in jail then from
18 that time, except the three days, straight through until
19 September of 2010, right? So, he's in jail from 2007 to
20 September of 2010 except for two days in March of 2008. He is
21 then in jail again from February 28 of 2011 for the gun charge
22 until today. The only time he is not in jail is from September
23 of 2010 to February of 2011, at least at the beginning of which
24 we know he's a Crip and not a Blood.

25 Now they say he switched. He became a Blood, and that

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1 anyway Crips and Bloods get along great, and they deal drugs
2 together. It really makes no difference if he's a Crip or if
3 he's a Blood. He's either in dealing in drugs with these
4 people or he's not, and all of these labels -- Crip or Blood or
5 associated with what Crips do -- is prejudicing the jury, so
6 that from day one, when they hear this in the opening, these
7 guys are Bloods, our guys are way behind the eight ball, and I
8 think it deprives them of a fair trial unnecessarily. this is
9 not an enterprise case.

10 THE COURT: I'm sorry, this is not a?

11 MR BUCHWALD: This is not an enterprise case. They're
12 not claiming that this was a Blood-induced-kind-of-thing; that
13 they're doing this for the community of the Bloods and the
14 proceeds are going to support all the Blood activities as
15 occurs in the Latin King cases or the Bloods cases that your
16 Honor may be familiar with from White Plains. There, the
17 notion was that the proceeds, the beneficiaries are the whole
18 group. This has nothing to do with that.

19 THE COURT: Let me ask, does the government alleged
20 that Mr. Thomas was at one point a Crip and one point a Blood?

21 MR. NAWADAY: Yes, your Honor. That's part of the
22 proof. That is going to be part of the testimony.

23 THE COURT: What about with respect to Mr. Christian,
24 was he part of more than one gang over the period of the
25 indictment?

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1 MR. NAWADAY: He is. We will be eliciting, we intend
2 to elicit, if allowed to, evidence from Mr. Baynes that
3 Mr. Christian was a member, a founding member of a gang called
4 Star Status and was friendly with the Bloods. Mr. Baynes was a
5 member of Star Status.

6 And to Mr. Goltzer's point that the charged conduct
7 had nothing to do with gang activity, we anticipate that
8 Mr. Baynes will testify that part of the reason the motive for
9 the stash house robbery at 54 Chambers Street was that
10 Mr. Christian wanted a way for Star Status, the members of Star
11 Status to get some quick money and drugs so that they could
12 sell more drugs on Deboise Street in Newburgh.

13 So, the whole gang-affiliation proof is inextricably
14 intertwined, we believe, with the direct proof in this case
15 both as to the relationship between our witnesses and the
16 defendants and also how the crime came about that is charged.

17 THE COURT: So Mr. Christian is not alleged to be part
18 of any gang other than Star Status?

19 MR. NAWADAY: Star Status, and I believe Mr. Baynes
20 will testify that before that, they were part of another gang
21 called Black Flag.

22 THE COURT: Black Flag?

23 MR. BAUER: Black Flag. And then they were friendly
24 with the Bloods that Mr. Christian hung out often with James
25 Williams, another Blood. There is also going to be evidence,

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1 we expect and testimony from Ramon McDermott, and part of his
2 testimony is hearing admissions from certain of the defendants
3 that were made at Bloods' meetings.

4 So that fact, the fact that these are Bloods'
5 meetings, we don't see how that can be separated out from the
6 direct proof of a conspiracy and our direct proof in the case.

7 THE COURT: What about with respect to Mr. Whitaker?
8 Is he alleged to have been a member of a gang?

9 MR. NAWADAY: Yes, he was initially an @Ashoe Bandit
10 and we will have we expect testimony from David Evans that
11 Mr. Whitaker was an @ash shoe Bandit, and afterwards
12 Mr. Whitaker became a Blood with Mr. Evans.

13 THE COURT: Given the fluid nature of the membership
14 of each of these defendants in these various gangs, how
15 important can that affiliation be? They are going from one
16 gang to another and forming different alliances. It doesn't
17 seem as though gang affiliation was a particularly strong
18 factor in their criminal activity.

19 MR. NAWADAY: Your Honor, I respectfully disagree. It
20 was because some of the acts we are seeking to admit, for
21 example, I believe one of the shootings that Mr. Baynes will
22 testify about with respect to Mr. Christian, it related to a
23 Crip who they were beefing with, that Star Status was beefing
24 with at the time. So it wasn't so fluid that gang affiliation
25 didn't matter.

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1 Plus, the gang affiliation point goes to the mutual
2 trust among all of these people. For example, we expect
3 testimony from Mr. Evans and Ms. Williams, who is part of a
4 group called 550. 550 means that you're not a Blood, but
5 you're friends with the Bloods, and Ms. Williams was a close
6 friend with the Bloods.

7 Both Ms. Williams and Mr. Evans will testify about
8 being in Bloods' controlled areas of Newburgh, in close
9 proximity to, for example, Mr. Whitaker, and seeing
10 Mr. Whitaker deal drugs. The only way that they're allowed to
11 be there is because of the gang affiliation. Just you and I
12 can't be there. We'd be kicked out. But it's because of that
13 affiliation that they're allowed to be there, and that's why
14 it's important to tell the entire story of what occurred in
15 this case.

16 MR. GOLTZER: You know, if Mr. Christian's alleged
17 motive was to get money for a group that Mr. Thomas and Mr.
18 Whitaker weren't members of, then the Court is absolutely
19 right, the conspiracy is either an agreement among these three
20 people to commit a particular crime, or not. They either went
21 to Chambers Street and did particular criminal acts or they
22 didn't. They either committed acts because they knew each
23 other or they didn't.

24 The fact that they're gangs is hardly central or
25 probative. In other words, the prejudice substantially

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1 outweighs the probative value.

2 If What they want to do is call a witness, for
3 example, to talk about Newburgh is the cesspool of gang
4 activity with discrete territories, then they're going to be
5 convicted before we even get to the evidence and the crimes
6 that are alleged.

7 THE COURT: When Mr. Henry, was it, was shot, were
8 these three guys in the same gang?

9 MR. NAWADAY: At that time, Mr. Christian was in Star
10 Status which was friendly with the Bloods. Mr. Whitaker and
11 Mr. Thomas were in the Bloods. In addition, we believe the
12 evidence is going to show that before the robbery,
13 Mr. Christian and Mr. Baynes went to see James Williams, L1,
14 who was a leading member of the Bloods at the time, and L1
15 assisted them in recruiting more robbers, who were other Bloods
16 who included Mr. Whitaker and Mr. Thomas.

17 THE COURT: Can the story of this conspiracy and these
18 crimes be told without reference to the gang affiliation?

19 MR. NAWADAY: Your Honor, I think it is almost
20 impossible to tell that story because the way these people know
21 each other is through their gang affiliations.

22 MR. GOLTZER: They know each other through living in
23 the same neighborhood. It's very easy for a group to know each
24 other because of that. Mr. Whitaker and these guys knew each
25 other from the neighborhood. They grew up together. They

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1 lived in the same area. They hung out with the same people.
2 That's why they trusted and knew each other. It's not
3 complicated.

4 MR. NAWADAY: And to that, your Honor, again, I don't
5 think that it can be that we can't go into our witnesses' gang
6 affiliation. I mean, it would be dishonest not to do that.
7 That is how our witnesses know these people. Our witnesses are
8 going to testify about their gang affiliation. The jury is
9 going to be left with this impression that somehow these Bloods
10 were with these random people committing crimes.

11 THE COURT: OK. I am very troubled by the extent to
12 which the gang affiliation will need to be discussed, but I do
13 believe that the government is entitled to elicit this
14 testimony.

15 So the defendant's motion will be denied, the motion
16 to preclude the defendants' affiliation with the Newburgh gangs
17 during the time that they allegedly committed the charged
18 crimes. I find that such evidence may provide relevant context
19 for the relationship between the co-defendants, and I do find
20 that in the context of this case the probative value outweighs
21 its potential prejudicial effect. And, moreover, there is some
22 portion of the government's argument that because the
23 cooperating witnesses will be testifying about their gang
24 affiliation, it is and does constitute Giglio material. So
25 although it is a close case, I will deny the defendant's

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1 motion.

2 What remains, the motion to preclude the expert
3 testimony by Mr. Meyers.

4 MR. GREENFIELD: Yes, your Honor. Rule 16(g) was
5 specifically enacted because on occasion an expert's testimony
6 carries great weight. The rule said that we're entitled to
7 receive notice of the witness' testimony along with a written
8 synopsis of what the testimony would be and a copy a CV.

9 The government told me on June 2 of this year that we
10 would be getting a CV a day or two after June 2. We didn't
11 receive that CV until July 28, this past Monday. It provides
12 very little information.

13 THE COURT: It's a very spare CV.

14 MR. GREENFIELD: To be honest, the CV that I received
15 for the medical examiner's testimony was five or six pages and
16 quite impressive. I need to at least conduct some
17 investigation into the proprieties witnesses himself being
18 offered as an expert, and I need to have more of a written
19 notice as to what his full statement will be; not just his
20 conclusions that are contained in the reports dated January 21,
21 January 31, and July 7 or 8, all of 2011.

22 THE COURT: Presumably, all he will testify to is
23 those conclusions, correct?

24 MR. GREENFIELD: Well, which tests he conducted, what
25 were the circumstances of the tests. Did he do the cuttings?

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1 Did he do the swabbings? Those all come into question in this
2 case, Judge.

3 I would like, if the Court allows, not today, maybe on
4 Monday, I would like to present to the Court ex-parte a basis
5 for what I am saying now which would be a significant part of
6 our defense at trial, and I don't want to go into it in front
7 of the government. It involves defense strategy.

8 THE COURT: I am happy to review whatever you want to
9 put before me. I will be a little busy Monday, but as soon as
10 I can get to it, I will.

11 Let me ask you this, Mr. Greenfield: Did the
12 government provide you with the report and with the notice of
13 the expert witness within the time period called for by the
14 rules?

15 MR. GREENFIELD: I'm sorry, Judge?

16 THE COURT: Did the government provide you with the
17 information that they were required to provide in a timely
18 basis?

19 MR. GREENFIELD: I'd say no. I mean, I've gotten the
20 reports and the conclusions of this particular witnesses. I
21 think the witness should also conclude in his report "I did the
22 following tests, I took the following procedures to get to my
23 conclusions." And, no, they didn't provide that. What tests
24 they did; under what circumstances they did it; did they do the
25 cuttings; were they done in a laboratory, or were they done

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1 elsewhere? Those are issues that I think are now open based on
2 the 3500.

3 THE COURT: OK.

4 MR. GREENFIELD: So I would at least ask the Court not
5 to preclude testimony. That's really not what I'm seeking.
6 I'm truly seeking, your Honor, to push back in time so I can
7 investigate the proprieties of his report, as well as consult
8 with my expert based on recently found information in the 3500.

9 THE COURT: Mr. Nawaday, I saw the CV, so-called. It
10 was more of a synopsis of a résumé. What happened here?

11 MR. NAWADAY: Your Honor, first, insofar as the CV, we
12 provided it when we received it. Second, we do think the CV is
13 sufficient to show what our expert, Mr. Meyers', credentials
14 are. I think the difficulty that -- or what Mr. Greenfield's
15 pointing out is the reason it's sparse is because he's been
16 working at the same place for the past 14 years. Our expert
17 has been working at the New York State Police Laboratory for 14
18 years. 12 of those years -- and it's set forth on his CV -- 12
19 of those years he was a forensic scientist and DNA analyst.

20 We've supplemented what he was doing during that time
21 in our reply papers. He's reviewed and analyzed DNA from
22 numerous items in hundreds of cases in his career. We set
23 forth that on page 7 of our reply papers that were filed -- it
24 was filed last night.

25 So, respectfully, I think the CV does set forth

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1 sufficient detail about what his credentials are. For the past
2 12, years he's been a forensic scientist and DNA analyst at the
3 New York State Police Laboratory conducting DNA analysis at an
4 accredited facility.

5 THE COURT: I suppose at a very sort of general level,
6 it says what he's been doing for the last 14 years, but as I
7 recall, there were like four or five lines to his CV, correct?

8 MR. NAWADAY: Your Honor, there was more than that.
9 Again, Rule 16 doesn't speak to how extensive the credentials
10 have to be. I think it has to just set for what they are and
11 what his educational background is.

12 THE COURT: But, for example, it doesn't indicate what
13 his duties involve, what types of examinations he conducts.
14 There may just be one kind -- I don't know. I don't know the
15 answer. But certainly having read his CV, I was still up in
16 the air as to what he would exactly testify to, but there is
17 some additional detail that is provided in the letter that was
18 submitted yesterday.

19 MR. NAWADAY: Insofar as what he testified to, that's
20 a separate question, your Honor. We provided these laboratory
21 reports in 2012.

22 THE COURT: Right.

23 MR. NAWADAY: Almost two years ago. So they know
24 this -- and these were laboratory reports that this witness
25 prepared. In addition to that, we provided all the underlying

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1 data and DNA files to the defense in March of this year at
2 their request. So, they've had the data, which, frankly, I
3 think was thousands of pages of materials, which included the
4 data from the equipment that was used to do the testing in this
5 case. So they have the substance and bases upon which this
6 witness will be opining in court when we call him.

7 So, to that extent, we have provided the substance, a
8 great summary of what he is going to be testifying about, his
9 conclusions, and the basis for his conclusions.

10 I understand, you know, Mr. Greenfield's point that
11 the CV came this week, but it's there, and I think it
12 sufficiently shows what his credentials are, and he can voir
13 dire the witness when the witness testifies.

14 THE COURT: When do you propose to call Mr. Meyers if
15 you are in a position to say.

16 MR. NAWADAY: Your Honor, we were hoping to call him
17 this Thursday -- not this Thursday, I apologize -- the coming
18 Thursday, which is August 7, and we have made travel
19 arrangements for him, understanding that if things get delayed,
20 then he will have to come the following week.

21 THE COURT: OK.

22 MR. NAWADAY: But he will not be one of the first
23 witnesses. He will actually come after --

24 THE COURT: But he will be in the first week?

25 MR. NAWADAY: We are hoping he is in the first week.

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1 We are hoping he will come after the first two cooperators.

2 THE COURT: OK.

3 MR. GREENFIELD: Your Honor, I would ask the Court to
4 impose upon the government to push him back in point in time to
5 give me an opportunity to conduct whatever investigation my
6 investigator can conduct regarding his CV and also to -- that's
7 basically it, Judge.

8 THE COURT: I'm sorry, what was the last part.

9 MR. GREENFIELD: That was basically it. I thought I
10 had said that. Your Honor, I would ask you push him into the
11 second week, any time in the second week. Or third week, or
12 whatever they want.

13 THE COURT: The application is denied. I do find that
14 preclusion of the evidence, first of all, is not warranted on
15 the facts. The government did appropriately disclose his
16 identity and his background. This was the sum and substance of
17 his proposed testimony. You've had his report and the backup
18 for the report for some months and the reports for some years.

19 Accordingly, the government will be entitled to call
20 Mr. Meyers when it wishes, but it might see clear to pushing it
21 back to address some of the defendant's concerns.

22 MR. NAWADAY: Your Honor, we will consult with
23 Mr. Meyers and see what his schedule is. I recollect that he
24 had a vacation plans the second week. I will see when that is;
25 and to the extent we can accommodate Mr. Greenfield, we will

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endeavor to do so.

THE COURT: Very well.

Anything further?

MR. BAUER: Two things, your Honor, that I think -- one is quick. Your Honor signed a search warrant last night or yesterday afternoon authorizing the government to search the phone that agreement Christian had on him at the time of his arrest September 4, 2012.

The government was able to download the contents of that phone this morning. It's fairly miraculous that we were able to do it so quickly. The report is 2500 pages long. So we have not had an opportunity to review the report. A lot of it is going to be meaningless data, but there are a number of text messages, a number of photographs, a number of other chats that we are going to look at.

We produced copies, the same copy that we have, we've produced that to defense counsel, and we have made representation to them that at this point, we are not seeking to introduce the evidence yet until we have a chance to review it, hopefully over the weekend. So I would suggest that we table a conversation of that, of the phone's admissibility until we know whether we want to actually offer it, but I wanted to put that out there now.

MR. GREENFIELD: This is Rule 16 material. They have this telephone in their possession since the date of arrest

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1 September 12, 2012. They decide the day before we get here
2 today to first look at the phone? They gave us two CDs full of
3 documents, God knows what else, tell us go view it over this
4 weekend when we're preparing for openings, preparing for
5 cross-examinations, preparing for some expert that we have to
6 prepare for. They should be precluded flat out. They had it.
7 They dropped the ball. Case closed.

8 MR. GOLTZER: We join the motion to preclude.

9 MR BUCHWALD: So do we.

10 MR. BAUER: Your Honor, I would ask --

11 THE COURT: I'll take it under advisement. It's not
12 being offered.

13 MR BUCHWALD: Can we ask the government be directed
14 to -- as soon as, if and when they find any connection to
15 either of the other defendants on that telephone, that we be
16 advised immediately; not at the end of the analysis of the 2500
17 pages, but that as soon as they get such a connection that we
18 be advised via email.

19 THE COURT: Well, I mean, you know, we're starting the
20 trial on Monday, so anything that has to be done has to be done
21 immediately. I don't know beyond that what more I can order
22 them to do. Obviously, they proceed at their peril if they
23 come two Fridays hence and say we want to introduce one page
24 from these 2500 pages.

25 MR. BAUER: Understood, your Honor.

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1 The last order of business -- and perhaps your Honor
2 will elect to do this on Monday, although I think today is
3 probably the better day to do it -- each of the defendants have
4 been offered plea agreements by the government. Some have been
5 offered multiple plea agreements. They have rejected those
6 offers, but I would ask your Honor to allocute the defendants
7 that they received those plea offers, they consulted with their
8 lawyers and that they have knowingly rejected those offers and
9 are voluntarily proceeding to trial.

10 MR. GOLTZER: I object to the form of the allocution
11 requested by the government. I think it is standard practice
12 appropriate for the Court to inquire of counsel whether counsel
13 has fulfilled their obligations and imparted plea offers to the
14 defendants, and that's all that need be asked.

15 THE COURT: OK.

16 MR. BAUER: I'm not sure what the actual obligation
17 is, your Honor, but I do know that most judges in this
18 district, as far as I know, although they are more experienced
19 than me at that table, allocute the defendants, not just the
20 defense counsel.

21 MR. GOLTZER: There is a privilege involved that
22 adheres to the defendants both in terms of privilege against
23 self-incrimination and the attorney-client privilege. Counsel
24 have professional obligations, and we represent to the Court
25 that any plea offers extended through counsel have been

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1 communicated to the defendants, and that there have been
2 discussions, and the defendants have elected to go to trial.

3 MR. BUCHWALD: Agreed. Same representation.

4 MR. GREENFIELD: As we do also, your Honor.

5 MR. BAUER: Your Honor, Mr. Nawaday is suggesting one
6 solution to this concern is you can ask counsel the question
7 that I had proposed, and then simply ask the defendants whether
8 they agree with what their lawyers had said.

9 THE COURT: I know that it is the developing practice
10 of some of my colleagues, because of recent Supreme Court cases
11 where defendants, after choosing to go to trial and losing and
12 receiving substantial sentences, thereafter complained that
13 their attorneys did not properly instruct them and did not
14 properly convey the contours of the offers; and because of that
15 failure on the part of counsel, that they received ineffective
16 assistance.

17 MR. GOLTZER: There are constitutional implications to
18 what the government suggests. Because of the severity of the
19 case, I want to be very precise in the record that I am making.
20 Our clients are under no obligation to answer questions from
21 the government, or, most respectfully, from your Honor, and we
22 decline to have them do so.

23 THE COURT: Let me put the question in that event --
24 at this time, I am not foreclosing the possibility that I would
25 ask the defendants directly -- but, Mr. Goltzer and

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1 Mr. Buchwald and Mr. Greenfield, has the government made plea
2 offers to your clients?

3 MR. GOLTZER: Yes, they have been communicated to the
4 defendant.

5 THE COURT: And what is your pleasure in light of the
6 offers that have been made?

7 MR. GOLTZER: The defendants have asked for a jury
8 trial, as is their right.

9 THE COURT: OK. Mr. Buchwald?

10 MR BUCHWALD: The same as Mr. Goltzer.

11 MR. GREENFIELD: That is accurately stated.

12 THE COURT: I take it all three counsel are
13 specifically requesting that the Court not inquire of their
14 clients that same type of question that I just placed to you?

15 MR. GOLTZER: Yes.

16 MR BUCHWALD: Yes.

17 MR. GREENFIELD: Yes, your Honor.

18 THE COURT: OK.

19 MR. BAUER: Your Honor, I guess I will leave it for
20 now. Perhaps we will consult some people in our office what
21 our office's position is now that they've declined. Just to
22 make the record complete, I think I should put on the record
23 what the plea offers were.

24 MR. GOLTZER: I object to that. It is inappropriate
25 under Rule 11 to involve the Court to that extent in that

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1 process.

2 Number two, if these defendants are found guilty at
3 trial, this Court will be involved in an independent sentencing
4 process. Totally irrelevant to that sentencing process will be
5 the nature of the offers that were made or not made to these
6 defendants. What the government seeks to do by way of policy
7 is to foreclose the defendants' rights, should they feel they
8 have the right, to make a 2255 motion later on.

9 There are very strict procedures that we are obliged
10 to follow. I am not suggesting that Mr. Whitaker or any other
11 defendant on behalf of himself is going to attack counsel for
12 not making a plea known to them. If they do, and the defense
13 counsel are ordered to respond by the Court, defense counsel
14 will truthfully respond.

15 That's all the government is entitled to. They are
16 not entitled to come into the camps of counsel. They are not
17 entitled to sully the record by telling the Court at this stage
18 of the proceeding what the plea offers were or weren't. It's
19 inappropriate. We are here to try a case.

20 THE COURT: Well, I don't know necessarily, and I
21 haven't thought about this, so this is likely something that we
22 should not do this afternoon, obviously.

23 MR. GOLTZER: We're taken by surprise too, by the way.

24 THE COURT: I'm sorry?

25 MR. GOLTZER: I'm taken by surprise by the government

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1 wanting to put the offers on the record.

2 THE COURT: I don't know necessarily that the
3 government simply making a record of what the offers were
4 implicates the judge or the Court in the plea bargaining
5 process. They are simply seeking to make a record.

6 MR. GOLTZER: I don't know. I just said it because it
7 seemed like the right thing to say. I could be wrong.

8 THE COURT: I don't know that you are. But I don't
9 think that simply placing the offers that were made on the
10 record implicates the Court. Certainly, given the recent
11 pronouncements of the Supreme Court, the government would seem
12 to have a very important interest in making very clear what the
13 offers were, so that there is not a challenge down the line
14 concerning what the offers were and what the responses to those
15 offers were.

16 MR BUCHWALD: The government could do that, your
17 Honor, by submitting something in writing to be sealed before
18 your Honor sees it and to be made part of the record. That
19 will not contaminate your Honor and involve your Honor in this
20 plea process.

21 Part of the purpose of what they want to do, we
22 believe, is let's let the judge know, for example,
23 hypothetically, the guy was offered 20 years. It's the message
24 of if he gets convicted, you ought to give him more than 20.
25 And that's what's achieved here. And that's wrong. That's

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1 wrong with what those colleagues of yours who have chosen to go
2 through this process and have things put on the record, I
3 believe that they are acting improperly when they do that.

4 But that's what's achieved. If they want to make a
5 record, they can submit what the plea offers were, have it
6 sealed right now. Your Honor can order it sealed, be part of
7 the record, and your Honor wouldn't see it until after
8 sentencing. If your Honor was curious after sentencing, your
9 Honor might look at it after sentencing, but then there isn't
10 any of this contamination.

11 MR. GOLTZER: I wish I'd thought of that. He's
12 smarter than me.

13 THE COURT: Well, I do understand that counsel's
14 argument.

15 Mr. Bauer?

16 MR. BAUER: Judge, I will come to your defense by
17 saying that I don't think you will be contaminated simply by
18 hearing the pleas. I think that is -- we are not talking to a
19 jury. We are talking to a member of the bar, but, your
20 Honor --

21 THE COURT: I can also imagine what the pleas have
22 been, so...

23 MR. SKWRAO: Your Honor, what I will also say is the
24 purpose of -- even if -- even if the defendants aren't inquired
25 of here today, the purpose of putting the plea offers on the

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1 record, on the public record is that so it is now public what
2 those offers were so that they cannot claim later that they
3 were oblivious to these offers and they never heard about these
4 offers.

5 Mr. Goltzer is exactly right, that is our interest.
6 Our interest is to avoid litigation later with them attacking a
7 conviction by saying they were oblivious to plea offers. So
8 even if you don't ask if they heard me or if they agree with
9 what their lawyers had said, it will be on the record, and that
10 way it will be something for us to point to later.

11 THE COURT: So let's do this: Why don't we think
12 about this. If the government wants me to engage in the
13 colloquy, they should provide questions that they want me to
14 ask and authority for my ability to do so because if we do it
15 we need to do it before jeopardy attaches, I would imagine.

16 MR. BAUER: I would think so, your Honor.

17 THE COURT: We would do it before we swear the jury.
18 So, there is some time between now and then, but let's get our
19 respective legal positions in order.

20 The defendants were not prepared to address this
21 issue, so let's give them an opportunity to gather their
22 thoughts and authorities.

23 MR BUCHWALD: One other from a housekeeping
24 standpoint, your Honor. I was at the MCC today from 12:30 to a
25 little after maybe one minute to 1:00. They wouldn't accept

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1 the clothing because there was no one there to accept it.
2 Nobody came down from R&D. Legal would not interfere. They
3 say they couldn't do it. So we are going to bring the clothing
4 back Monday morning and ask that the marshals let them change
5 here because I can't get to the MCC over the weekend. They
6 won't take it over the weekend, in any event. So just to let
7 folks know, we will have clothing here on Monday morning, and
8 we will try to be here at 9:00 so that they can change before
9 9:30.

10 THE COURT: The record should reflect that I am facing
11 the marshal.

12 THE MARSHAL: Your Honor, that is not the way it
13 usually goes. You submit an order, we'll send it over to them,
14 and they'll accept the clothes. We have done this several
15 times. MCC cooperates completely.

16 THE COURT: Well, I know that I signed an order to
17 that effect. I don't know whether it made its way to the MCC,
18 but defense counsel did submit an order which I executed.

19 MR BUCHWALD: They just wouldn't take it. We had the
20 order. We had the clothes. Nobody would come down and take it
21 from us.

22 Mr. Whitaker is at the MDC, so it is just not going to
23 be possible to do it. The clothing that will be brought in
24 will be brought in by counsel, will be made available to the
25 marshals. We have always been accommodated by the marshal

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1 service on the morning of a trial so that we didn't have to
2 delay. Obviously, the clients can't be in front of a jury in
3 prison garb.

4 MR. GREENFIELD: We have not heard from our client's
5 family whether or not they were able to deliver it this
6 morning, but we will ask for the same courtesy of the marshals
7 if they refuse acceptance.

8 THE COURT: Well, I am certainly happy to accommodate
9 whatever safety-related concerns the marshals have. Obviously,
10 the Court's interest in this is that we are able to proceed to
11 jury selection as early as possible without any undue delay. I
12 know that I did sign the orders. These lawyers have been
13 around this court for many, many years. They are very well
14 respected, and I don't imagine that they are telling us
15 anything that is not accurate. I will leave it up to them to
16 make additional efforts and to the marshals to be as
17 accommodating as you can.

18 MR. BUCHWALD: Thank you. And I apologize to the
19 marshals. I know it is -- it's not their job. We tried to get
20 to the MCC. I was there for half an hour, calling the legal
21 department. I tried calling the warden's office. They simply
22 wouldn't bring anybody downstairs. They said it's a prison.
23 It's hard.

24 THE COURT: Mr. Bauer, anything to add?

25 MR. BAUER: I think we've done more than enough here

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1 today.

2 THE COURT: OK. First of all, it's 20 after 6:00. I
3 want to apologize and thank the marshals for accommodating the
4 court and the parties, and I know you should have been home
5 along time ago. So thank you and thank you all for being so
6 patient.

7 MR. GOLTZER: We want to thank your Honor for giving
8 us as much time as needed.

9 THE COURT: That is what I'm here for. If there is
10 anything over the weekend, you can send emails to chambers, and
11 we will get to them as soon as we can. Thank you, folks. See
12 you Monday morning.

13 (Adjourned)